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EMPLOYMENT TRIBUNALS

Claimant: Mr A Soriano

Respondent: Essex County Care Ltd

Heard at: East London Hearing Centre **On:** 1 June 2017

Before: Employment Judge Goodrich (sitting alone)

Representation

Claimant: Miss A Soriano (Daughter of Claimant)

Respondent: Mr M Stephens (Counsel)

Court interpreter (Tagalog/Filipino): Mrs A Perkins

RESERVED JUDGMENT

It is the judgment of the Employment Tribunal that:-

1. The Claimant's complaint of race discrimination is dismissed on withdrawal by the Claimant.
2. The Claimant's unfair dismissal complaint fails and is dismissed.
3. The Claimant's wrongful dismissal case fails and is dismissed.

REASONS

The claim and the issues

1. The background to this hearing is as follows.
2. The Claimant's Employment Tribunal claim was presented on 17 May 2016. Before issuing his claim he undertook ACAS early conciliation between 30 March and 30 April 2016.

3. In box 8.1 of his claim form the Claimant ticked that he was bringing claims for unfair dismissal, race discrimination and notice pay.
4. In box 5.1 of his claim form the Claimant stated that his employment started on 14 February 2008 and ended on 1 March 2016.
5. In box 8.2 of his claim form the Claimant gave details of his claim that he had been dismissed by the Respondent on 1 March 2016.
6. There was a long delay before the Claimant's Employment Tribunal claim was processed. It appears, from my reading of the Employment Tribunal's file on this case, that it was overlooked by the administration and was not processed until after a telephone call was received from the Claimant seeking an update on his claim.
7. The Claimant's claim was accepted.
8. The Respondent entered a response denying the Claimant's claims.
9. The Respondent, in box 4.1 of their response form,
10. stated that they agreed with the dates of employment given by the Claimant.
11. The Respondent's grounds of response were contradictory. In paragraph two of box 6.1 of the ET3 response was a statement that the Claimant was employed from 14 February 2008 – 1 March 2016. In paragraph five, however, was a statement that the Respondent did not dismiss the Claimant on 1 March 2016. Paragraphs 6 – 18 gave further details of the Respondent's case in response to the unfair dismissal claim.
12. In paragraph 26 of the grounds of response the Respondent denied that the Claimant was owed any notice pay; and in paragraph 27 stated that he had failed to particularise his claim of discrimination in his ET1 form. There was a statement that they would request further and better particulars of the alleged discrimination.
13. In a letter from the Employment Tribunal dated 17 February 2017 the Claimant was directed by Judge Gilbert to give further details of his race discrimination claim.
14. In a letter dated 23 February 2017 particulars were given by the Claimant, including that he did not claim that the sole reason he was dismissed was due to race but felt that it played a part in him losing his job.
15. The Respondent's representatives wrote to the Tribunal, in an email sent on 2 March 2017, asserting that the Claimant's claim for race discrimination was unfounded.
16. In reply the Claimant sent an email dated 2 March 2017 stating that if the Tribunal and the representative both agreed that the claim for race discrimination has no possibility of succeeding then, by all means, he was willing to withdraw that particular claim; but that he did not go on unauthorised leave and the detail of his unfair dismissal claim should go ahead.
17. In reply to the Claimant's email to the Tribunal, a letter dated 3 March 2017 was sent to the parties. In this letter Judge Prichard directed that he considered that the

Claimant's email of 2 March 2017 amounted to a withdrawal of his race discrimination complaint. He cancelled the Preliminary Hearing that had been listed on 6 March 2017 to clarify the issues in the case.

18. Although the case was listed for a two day hearing, only one day was available for me to hear the case. As closing submissions only finished late in the afternoon I have reserved judgment in the case.

19. The Employment Tribunal arranged for an interpreter to be booked to interpret for the Claimant in Tagalog (Filipino). I am grateful for the assistance of Mrs Perkins in doing this.

20. The Claimant was represented by his daughter.

21. At the outset of the hearing I clarified the issues with the parties' representatives.

22. Firstly, it appeared to me that the Claimant's email to the Tribunal offering to withdraw his race discrimination claim appeared to be equivocal. I explained that I was not concerned with whether the Respondent thought that the Claimant's race discrimination had little prospect of success and that the Employment Tribunal Judges that had directed letters to be written to the Claimant were not expressing an opinion on the prospects of success but were trying to make sure what claims he was bringing. I clarified, on more than one occasion before hearing evidence, whether or not he wanted his claim to be withdrawn.

23. The Claimant's daughter, Miss Soriano, confirmed that he was not pursuing a race discrimination case. I checked, therefore, that she was content, on behalf of her father, for his race discrimination claim to be dismissed on withdrawal by him; and she confirmed that she was.

24. I expressed surprise to Mr Stephens that the Respondent was agreeing with the Claimant that the date of termination of the Claimant's employment was 1 March 2016 when they were also stating, in paragraph 4 of the grounds of the response, that the Claimant was not dismissed by the Respondent on that date.

25. After I had sought clarification as to the Respondent's case as to the date the Claimant's employment ended, Mr Stephens, on behalf of the Respondent, applied for the response to be amended. Paragraph 2 of the grounds of defence contained the statement:

"The Claimant was employed from 14th February 2008 to 1st March 2016".

Mr Stephens applied for the words "to 1st March 2016" in paragraph 2 of the Respondents grounds of defence to be removed; and, instead, for the paragraph to contain the sentence:

"On or about 30 March 2016, alternatively 11 April 2016 (when the Respondent received the Claimant's letter dated 8 March) alternatively 14 April (when a fax was received); alternatively 30 March 2016 when ACAS was contacted by the Claimant".

26. Miss Soriano objected to such an amendment. After hearing from both

representatives I decided not to allow the fuller amendment applied for by the Respondent; but merely to permit the contradiction to be resolved by the words in paragraph two of the ground of response “to 1st March 2016” being removed.

27. When I was taken to page 61 of the bundle of documents I saw that the Claimant’s letter to the Respondent, received on 11 April 2016, included a statement that the mutual trust and confidence between him (the Claimant) and Essex County Care Ltd (the Respondent) had been broken and that is what had prevented him going back to work. I enquired with Ms Soriano whether that meant that he was seeking to bring a constructive unfair dismissal claim as an alternative to his claim that his employment was terminated by the Respondent on 1 March 2016. Initially she sought to make such a request. Mr Stephens objected to the application. After some discussion of the implications of the issue, with the Respondent possibly needing to call additional evidence on what had happened between 1 and 15 March, the Claimant decided not to pursue this application to amend.

28. The agreed issues for me to decide in the case were as follows.

Unfair dismissal

29. The Respondent accepts that the Claimant was an employee of the Respondent, had the necessary continuous employment to be entitled to bring an unfair dismissal claim (and notice pay claim) and has brought his claim in time.

30. The Respondent’s case is that the Claimant was not dismissed by the Respondent on 1 March 2017.

31. If, contrary to the Respondent’s case, the Tribunal were to decide that the Respondent dismissed the Claimant on 1 March 2016, the Respondent would accept that this dismissal was unfair.

32. The Respondent would contend that the Claimant would or might have been dismissed if fair procedures had been followed; and that the Claimant caused or contributed to his dismissal. The Respondent’s case is that the Claimant caused or contributed to his dismissal by going on unauthorised leave from 18 January – 28 February 2016; a further period of unauthorised absence on 29 March 2016; and falsely claiming to his line manager in a conversation on 29 February 2016 that he had just returned to the UK and was at the airport. The Claimant would resist any reduction of award.

Notice pay

33. The Claimant contends that he is entitled to eight weeks’ notice pay when dismissed on 1 March 2016.

34. The Respondent disputes that he was dismissed on 1 March 2016 and that he was entitled to notice pay.

Other matters

35. The Claimant had handed to the clerk a document between the parties which

included details of some negotiations. I returned the document as it appeared inappropriate for it to have been provided to me. The Respondent waived privilege on an offer that had been made to the Claimant of £600 which the Claimant had rejected.

The relevant law

36. Section 94 Employment Rights Act 1996 (“ERA”) gives an employee the right not to be unfairly dismissed by their employer.

37. Section 95 sets out the circumstances in which an employee is dismissed. Section 95(1)(a) ERA provides that an employee is dismissed if the contract under which he is employed is terminated by the employer (whether with or without notice).

38. Whether an employee has resigned or been dismissed is a question of fact for the employment tribunal to determine on the evidence. Whatever the respective actions of the employer and employee at the time of the termination the question always remains “who really terminated the contract of employment?”

The evidence

39. On behalf of the Claimant I heard evidence from the Claimant himself.

40. On behalf of the Respondent I heard evidence from Ms Paula Johnston, home manager for the care home where the Claimant worked and the Claimant’s line manager. I was also provided with a witness statement from Ms Tina Boyles who did not, however, attend this Tribunal Hearing.

41. In addition I considered the documents to which I was referred in an agreed bundle of documents.

Findings of fact

42. I set out the findings of fact I consider relevant and necessary to decide the issues I am required to decide. I do not seek to set out each detail that was provided to me, nor make findings on every detail on which the parties were not agreed. I have, however, considered all the evidence provided to me and borne it in mind.

43. The Claimant, Mr Alfredo Soriano, commenced employment with the Respondent on 14 April 2008.

44. The Claimant was employed by the Respondent as a laundry assistant on a contract to work 40 hours per week.

45. The Claimant worked at the Scarlett’s Residential Care Home in Colchester, which is a care home run by the Respondent. In its ET3 response the Respondent described the company as employing 210 people in Great Britain; and 48 at the place where the Claimant worked.

46. The manager for the Scarlett’s Care Home where the Claimant worked has been, for about five years, Ms Paula Johnston. She has worked with the Claimant throughout his employment with the Respondent and was his manager for the last five years of his

employment with the Respondent.

47. Ms Johnston was the Claimant's line manager. In addition she was supported by senior carers, one of whom was Tina Boyles. The Respondent's explanation for Ms Boyles not attending the Tribunal was that she no longer works for the Respondent.

48. The Claimant is of Filipino origins. His knowledge of English is reasonable for the purposes of his day to day working arrangements, being described by his manager as "not too bad"; and by the Claimant as not fluent. The Claimant's daughter, who represented him at this hearing, speaks good English.

49. The Claimant was conscientious and good at his job; and, so far as I was made aware, there were no disciplinary issues during his employment prior to the events that gave rise to this claim.

50. The Respondent has its own in-house human resources department including a Mr Peter Ure and Mr Ben Tyrell.

51. In 2014 the Claimant made an application for four weeks' annual leave to be taken from 20 July – 20 August 2014. This was refused by Mr Ure, the Respondent's personnel manager, on the basis that he was only able to authorise a maximum of 17 days subject to various conditions. Two of these were that prior to the departure he must produce a ticket or travel itinerary showing both date of travel and date of return; and days off directly before or directly after the holiday were not permitted.

52. The Respondent has a written policy on annual leave. Amongst the provisions of the policy are the following:

52.1. Annual leave periods had to be approved by the home manager and confirmed by the operational manager before outside arrangements were made.

52.2. Verbal requests for leave would not be accepted.

52.3. Due to the requirements of the care industry, of the Health and Social Care Act 2008 and residential forum staffing levels it was stated to be necessary to limit the number of staff taking leave at any one time and restrict the duration of holiday taken to a maximum of two weeks on any one occasion. Consideration to periods of leave in excess of two weeks might be given in emergency situations only for a maximum of 17 days (subject to evidence) and strictly at the discretion of the managing director. Taking leave for more than two weeks on any one occasion, without authorisation, would be considered to constitute gross misconduct and be subject to disciplinary action. Annual leave taken at any period without authorisation and approval would also constitute gross misconduct.

53. The Claimant accepted when cross-examined that he was aware of these rules at the time he made a leave request in January 2016.

54. On 15 January 2016 the Claimant was informed by his wife that her mother (the

Claimant's mother-in-law) had died. I understand that, tragically, she was murdered.

55. Very shortly after the Claimant was notified that his mother-in-law had died he informed Ms Johnson of his mother-in-law's death. Ms Johnston allowed the Claimant to leave work early in order to comfort his wife; and asked him to let her know what their plan was.

56. The following day, and without having obtained permission from Ms Johnson, the Claimant booked return flights for the Philippines. The Claimant and his wife booked flights to go out to the Philippines on 18 January and to fly back to the UK on 28 February.

57. The Claimant wrote a letter, drafted by a friend, to Ms Johnston on 17 January 2016. He notified Ms Johnston that he understood that his wife's mother had been murdered. He stated that she was in no mental state to travel by herself and that he needed to accompany her. He notified Ms Johnston that they had booked flights to the Philippines to leave on 18 January 2016; and that they would not return for six weeks as they could not be sure when the funeral might take place as the circumstances of her death might delay burial. He did not notify Ms Johnson of the exact date of his return flight. He ended the letter with the following:

"I hope you can understand my dilemma and that my job will still be waiting for me when I return. I am very sorry to give you such short notice but I feel I have no alternative. Please understand. I will make contact with you again on my return."

58. The Claimant understood and accepted in cross-examination that he knew that obtaining such a long period of leave without authorisation was gross misconduct and that he was not permitted to book flights before being authorised for leave. He knew that authorisation had to come from head office.

59. All the above findings of fact are, so far as I was made aware, agreed.

60. In dispute between the parties is whether the Claimant, as he was about to leave for the airport on 18 January, telephoned Ms Johnston to notify her that he and his wife were on the way to Heathrow; to ask her to give the letter to the company; and was informed by Ms Johnston that he should go and comfort his wife; and in response to the Claimant's stating that he would call her when she came back to the UK said "Ok, you go" (the Claimant's evidence was that this was the conversation; whereas, in Ms Johnston's evidence, she denied that they had any conversation about the matter other than the one to which I have referred above, prior to the Claimant's departure.

61. On the balance of probabilities I find that the Claimant did not telephone Ms Johnson on 18 January; and that, even if he did, he did not obtain her permission to take six weeks leave. I so find because:

60.1 The Claimant had booked his flights before the telephone call he says he made and was on his way to the airport. If telephoning Ms Johnson he would have not have been telephoning to ask for permission to have extended leave, but to be presenting her with a "fait accompli". He had already written to her to inform her.

- 60.2 Ms Johnson did not have authority to give the Claimant permission to take more than 14 days leave, as both of them were well aware. As referred to in paragraph 50 above, the Claimant's request for 4 weeks leave in 2014 was considered by Mr Ure, not Ms Johnson. The Claimant knew that 17 days was the maximum leave permitted at any one time; that any leave above two weeks at one time needed the permission of the managing director; and that any leave taken without authorisation and approval constituted gross misconduct.
- 60.3 Even on the Claimant's version of events it appears questionable whether Ms Johnson gave permission. Even, however, if they did have a telephone conversation I do not believe that Ms Johnson would have used the words the Claimant said that she did, because she was not in a position to allow him to; and, if she had given him permission, it is unlikely that she would have dismissed or suspended him on his return.
62. Whilst the Claimant was in the Philippines he had no contact with Ms Johnson.
63. Before the Claimant's actual date of return Ms Johnson was informed by a colleague of the Claimant's that the Claimant had returned to the UK.
64. The Claimant's return flight arrived in the UK late on 28 February.
65. The following morning (29 February) Ms Johnson telephoned the Claimant on his mobile telephone number to ask if he was back in the UK. By then the Claimant was back at home. He told Ms Johnson, however, that he was at the airport.
66. The Claimant's wife telephoned Ms Johnson later that day to explain that he had arrived home the day before, apologise for her husband's conversation earlier and explained that it was because he was jet lagged.
67. After obtaining advice from the Respondent's human resources department Ms Johnson telephoned the Claimant again to ask him to come to the Home the next day (1 March); and to bring his flight documents with him.
68. The Claimant attended his workplace the next day and brought his flight documents, as required by Ms Johnson. Ms Johnson asked him and Ms Boyles to come to her office. She asked Ms Boyles to attend in order to be a witness of the meeting.
69. The Claimant and Ms Johnson disputed what was said at that meeting. The Claimant's evidence was that Ms Johnson told him that he could not work anymore for the company; he asked her if that was the final decision; she said "yes"; and he accepted her decision, telling her that he would look for another job. Her evidence was that she told him that due to him having taken leave without permission he had been told to send him home and that HR would be in touch with him. On the balance of probabilities I find Ms Johnson's account of the meeting more convincing; and that the Claimant by then either did not want to work for the Respondent anymore, or he believed that he would be dismissed if a disciplinary hearing was to take place and did not want this to happen. I so find including for the following reasons:

- 68.1 If the Respondent was intending to suspend the Claimant, as Ms Johnson says, they handled it badly. They did not follow up the meeting by writing to him in the next few days to confirm that he had been suspended. Nor was Ms Johnson able to tell me, when I asked her, whether the Claimant had received pay whilst suspended. Ms Johnson's explanation was that she left matters in the hands of their in house human resources department. Nonetheless, it was her responsibility, as a manager, to make sure that they were dealing with the matter promptly. These are points in favour of the Claimant's account of events.
- 68.2 Overall, however, I find Ms Johnson's account of events the more likely.
- 68.3 I have considered whether there was, simply, a misunderstanding, with the Claimant believing that Ms Johnson had dismissed him; and Ms Johnson believing that she was suspending him. Having considered all the evidence provided to me, however, I find that, at best, the Claimant was unsure at the time whether or not Ms Johnson intended to dismiss him and did not want to clarify what the position was.
- 68.4 Ms Johnson was an experienced manager and had an in house human resources department that she was taking advice from. She made sure that she had a witness for the meeting, Ms Boyles. It is most unlikely that she would have had any intention to dismiss the Claimant without the necessary procedural formalities.
- 68.5 There was a handwritten note for that day in the Respondent's log book stating "A Soriano Been in and sent home and Head Office aware". This is consistent with Ms Johnson's evidence.
- 68.6 The subsequent communications from the Respondent, to which I refer below, show, at least, that Ms Johnson was not intending to convey to the Claimant that he had been dismissed.
- 68.7 The manner in which the Claimant went to the Philippines showed a reckless disregard for keeping his job. He must have known, from his previous experience in 2014, that it was highly unlikely that he would be granted six weeks leave.
- 68.8 He could, like his daughter, have flown back within 2 weeks of flying out, whether or not his wife stayed in the Philippines. He could have written to Ms Johnson, whilst he was abroad, to thank her for giving him six weeks leave if he truly believed that she had given him permission. He could have let Ms Johnson know the date of his return flight.
- 68.9 I am mindful that the circumstances of the Claimant's leave were traumatic. The Claimant knew, however, at the time that what he had done amounted to gross misconduct under the Respondent's rules.
- 68.10 If the Claimant believed that he had been dismissed, he could have appealed against the dismissal but did not.

68.11 As referred to below, the Claimant did not co-operate with the Respondent's attempts to get him to engage with them. For example, I asked him why when he received a letter about 2 weeks later stating that he had not been dismissed, he did not go back to work, he stated that the delay was too long and that he would have returned to work if the Respondent had got in touch with him sooner. This was unconvincing in the context of the Claimant not having got another job. As referred to below, the Claimant's responses gave me the impression that he seeking to build a case for unfair dismissal, rather than retain his job.

70. There is a dispute between the parties as to whether, in the next two weeks, the Respondent made frequent telephone calls to the Claimant. Whether or not they did the Claimant accepted when cross examined that he received a telephone call on 14 March that he did not answer. He also received a facebook message from Ms Boyles to contact the Home as soon as possible.

71. Mr Tyrell, from the Respondent's HR department, wrote to the Claimant, by letter dated 15 March. He asked the Claimant to contact Scarletts with a view to return to work.

72. In response, the Claimant wrote back, in a letter dated 24 March, although received only on 30 March. He stated that Ms Johnson had agreed to his leave of absence, had confirmed it in a telephone conversation on 18 January; and had summarily dismissed him when he arrived at work on 1 March. He stated that he had been unfairly and wrongfully dismissed and would be seeking compensation. The wording of this letter contributes to my impression that the Claimant was trying to build an unfair dismissal case, rather than doing his best to keep his job.

73. Mr Tyrell replied to the Claimant in a letter dated 31 March. He notified the Claimant of the rules about the maximum leave allowed; stated that no approval had been given by the Managing Director for his extended leave; told him that he had not been dismissed and that there was no record on the file that he had been dismissed; and no communication from the company to such an effect; and stated that the Home and Mr Tyrell had made various attempts to contact him to which they had received no response. He asked the Claimant to attend a formal meeting on 7 April.

74. The Claimant wrote back to Mr Tyrell. Although his letter was dated 7 March it was received on 11 April and must have been intended to have been dated 7 April. He re-iterated that he had been verbally dismissed by Paula (Johnson). He stated that he could not work there anymore and that confidence and trust had been broken. He stated that he would not attend the meeting on 12 April.

75. Mr Ure, the Respondent's Personnel Manager, wrote to the Claimant by letter dated 11 April. He informed the Claimant that the meeting had been re-arranged for 14 April, strongly advised him to attend to give his side of events and told him that if he did not a decision would be made in his absence. In reply the Claimant stated once more that he had been dismissed and so would not be attending any meetings.

76. From all the evidence provided to me who, therefore, really terminated the contract of employment? I find that it was the Claimant that did so. The Claimant's employment was not terminated on 1 March 2016, for the reasons given above. I find

that the Claimant's contract of employment with the Respondent terminated on 11 April 2016 when the Respondent received the Claimant's letter (mistakenly) dated 8 March 2016. In that letter, despite the Claimant having been unequivocally informed that the Respondent had not terminated his employment and had invited him to a formal meeting, he re-iterated that he regarded himself as having been dismissed and refused to attend the meeting.

Closing submissions

77. Both representatives gave oral submissions in support of their respective cases. I do not set them out in detail, although I have borne them in mind.

Conclusions

78. For the reasons given in my findings of fact above, I have concluded that the Claimant resigned from his employment and was not dismissed within the meaning of section 95(1)(a) ERA. As referred to above, the Claimant did not pursue a case that he had been constructively dismissed.

79. As the Claimant's contract of employment was terminated by his own resignation, rather than through having been dismissed, the Claimant is not entitled to notice pay and his wrongful dismissal claim fails

80. The Claimant's claims of unfair dismissal, therefore, fail and are dismissed.

Employment Judge Goodrich

26 June 2017