EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
(1) Ms C Eversley **(2) Ms E Bannor-Addae** **(3) Mr E Sackey**	**v**	**Social Responsibility Investments Ltd**

Heard at: Watford **On**: 17 April 2018

Before: Employment Judge George

Appearances

For the Claimants: Ms S Sleeman, Counsel
For the Respondent: no attendance and no representation

JUDGMENT

1. The claims against the second respondent are dismissed on withdrawal. In this judgment Social Responsibility Investments Ltd (formerly the first respondent) are hereafter referred to as the respondent. The first claimant is Ms Eversley, the second claimant is Ms Bannor-Addae and the third claimant is Mr Sackey.

2. The first claimant and the third claimant are entitled to redundancy payments however, they have received their redundancy payments in full from the Insolvency Service and therefore those claims are dismissed.

3. The claim of breach of contract in respect of a failure to pay remuneration are well founded.

4. The respondent shall pay to the first claimant the following sums as damages for breach of contract;

    4.1. £4,650.63 unpaid wages for period 16 May 2017 to 7 August 2017,

    4.2. £284.00 shortfall on money due by way of notice pay.

5. The respondent shall pay to the second claimant as damages for breach of contract;

5.1 £3,836.48 unpaid wages for period from 16 May 2017 to 7 August 2017,

5.2 £179.75 shortfall on money due by way of her notice pay.

6. The respondent shall pay to the third claimant, the following sums as damages for breach of contract;

6.1 £4,979.50 unpaid wages for the period 16 May 2017 to 7 August 2017,

6.2 £720.40 shortfall on money due by way of notice pay.

7. In respect of the claims of unauthorised deduction from wages in respect of a failure to pay annual leave accrued, but not taken, on termination of employment;

6.1 The respondent is to pay to the first claimant the sum of £528.42.

6.2 The claims by the second and third claimants are dismissed.

8. There was a breach of the duty to consult under section 188 of the Trade Union and Labour Relations Consolidation Act 1992 (hereafter the 1992 Act) by the respondent.

9. It is just and equitable to make protective award under section 189(2) of the 1992 Act.

10. The protective period is 80 days. The respondent shall pay to the first claimant in respect of this head of claim, the sum of £15,348, to the second claimant the sum of £13,316 and to the third claimant the sum of £12,496.

REASONS

1. This claim was originally brought against two respondents, the second respondent is the liquidator of the first respondent and therefore has got no personal responsibility for the acts complained of, the claim has been withdrawn against the second respondent and is dismissed today. I have renamed the first respondent as “the respondent”. The respondent has not entered an appearance nor has it appeared or been represented before me.

2. At this hearing I have had the benefit of a bundle of documents prepared by the claimants, who are represented by their professional body. Page numbers in these reasons refer to that bundle. They gave oral evidence with reference to written witness statements setting.

3. The three claimants were all employed in care homes ran by the respondent.

4. The third claimant was the longest serving employee, he started on 12 February 2013, see his contract starting at page 73, and he was a Senior Nurse.

5. The first claimant started work on 13 April 2015 (see her original contract at page 82) and was promoted to Site Manager (see the correspondence at page 90). Initially, the first and third claimants worked for an organisation called Alice Lodge until their employment transferred by reason of a relevant transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006, which took place in about April 2016.

6. The second claimant started work on 24 October 2016, and her contract is at page 91.

7. By this point in time, the respondent had three premises which were operated as care homes for vulnerable adults, some of whom had mental health difficulties. Those were: The Lanes, 3-5 Foxley Lane; 849 Rosina Gardens and 851 Brighton Road. The second claimant was originally working from 851 Brighton Road, the other two claimants' normal place of work was 3-5 Foxley Lane, although the third claimant did work from 851 Brighton Road on occasions.

8. In about May 2017, the home at 851 Brighton Road closed. I can see from an email at page 100 that the HR Manager of the respondent, Siobhan Kilmurray, wrote to the first claimant, among others, attaching a list of staff who were affected by the closure. The normal place of work of some staff moved to 3-5 Foxley Lane at that point.

9. The three claimants all received letters dated 6 July 2017 in materially identical terms. That to the first claimant is at page 112. It is in formal terms following a fairly standard template stating that all employees employed by the respondent will be at risk of redundancy, apart from staff who are on a zero hours contract. However, the letters to the second and third claimants, whose remuneration varies with the hours that they work, were in materially identical terms notwithstanding that. I understand that these letters were left for staff at the premises at 3-5 Foxley Lane, and may not have been collected by those who were not on shift on 6 July.

10. 3-5 Foxley Road closed on 7 July 2017 and I am told that the final care home closed at the end of that month. The letter of 6 July says that a 30-day consultation period is going to start and that there would be an election of employee representatives. However, these steps were not taken. The claimants' employment was terminated by letter on 7 August 2017. The letter directed to the first claimant is at page 125, to the second claimant at page 129 and that to the third claimant at page 127. Again they are in materially identical terms.

11. The letter says that the respondent had written to all the employees who could have been affected to explain why the company was considering making redundancies. It claims that the respondent has explored ways in which the redundancies could be avoided and possible alternative employment, but that the company is insolvent and so they are unable to provide any suitable alternative employment.

12. Because of their period of service, the three claimants were entitled to minimum periods of notice of termination of employment. The letter to the first claimant does claim that the effective date of termination of employment was 7 July 2017. However, it is not possible to agree a date of termination of employment that precedes the notification being given and I conclude that the employment in fact terminated on 7 August in respect of each of these claimants.

13. A grievance was put in by the first and second claimants on 7 August, but no response was received to that grievance. These three claimants entered claim forms on 3 November 2017 and they were served on 21 November. There has been no response by the then first respondent and the second respondent, the liquidator, has merely written to say they are not contesting the claims.

14. I am told that there are some 29 other claimants bringing similar claims against this same respondent and that those cases are proceeding in London South Employment Tribunal. However, that does not affect the decision I have to make today.

15. So far as the claim for redundancy payments are concerned, it is clear from the evidence before me that the respondent became insolvent and that this was a redundancy situation. I have reached this conclusion because both the remaining homes closed with the loss of all jobs. Furthermore, a set of financial statements in respect of the company (page 143) have been provided by Valentine and Co, with a fact sheet for employees, who are listed among the creditors. Amongst other things, the financial statements provide at page 147 that there were 66 employees of the company at the date of cessation of trading. It is therefore clear to me that all of the employees were made redundant.

16. The first claimant, who was the Site Manager, gave evidence, which I accept, that there were approximately 26 employees at 3-5 Foxley Lane prior to the closure of 851 and some six nurses and care assistants transferred following the end of May 2017. I accept that, because of her role, she is in a position to know the number of staff there. I find that there were at least 32 employees working at 3-5 Foxley Lane from the end of May 2017 onwards.

17. I also accept, based on the financial information that is in the bundle, that there was a redundancy situation. Ordinarily, the first and third claimants, because of their long service, would be entitled to redundancy payments. Happily, they have been able to receive sums covering those payments from the Insolvency Service and therefore nothing remains owing and I dismissed those claims.

18. So far as a breach of contract claims are concerned, all three claimants were paid late and irregularly from April 2017 onwards. The payment period was from 16th of one month to 15th of the next month. Staff were paid at the end of the month. All three were eventually paid in full up to and including 15 May 2017 and the payslip dated 31 May 2017 in respect of each claimant covers their wages due up to 15 May 2017. I have seen both payslips and entries in the bank statements and I am quite satisfied that that is the case.

19. All three were issued with payslips dated 30 June 2017 that cover the period from 16 May 2017 to 15 June 2017 and show what was owed for that period. They do not have payslips for July 2017 and they were not in fact paid the money that was owing to them as shown on the June 2017 payslip.

20. Dealing first with the first claimant, her hourly rate is recorded in her payslips as being £17.94 gross (see page 374 for example), and I accept the sums claimed by way of average monthly salary in the various schedules of loss, which it is said have been calculated as an average of the three-months April, May and June 2017. It is clear that the payslips include some payments in addition to her monthly salary, for example payment for working during bank holidays and some additional sums which are described as gratitude payments. The first claimant explained that these were connected with good service in relation to a particular client and I conclude that there was every prospect that this was a regular event. It is therefore right to take those three payslips and average them in order to find the average wage, which the three claimants generally earned.

21. It seems to me that it is more appropriate to calculate these as a breach of contract claim because the second and third claimants had contracts which meant that their salary varied with the hours that they worked. I find that the respondent was under an obligation to provide them with regular work. As a matter of fact, looking at the payslips that I have available to me, the second and third claimants regularly worked at least their full contracted hours of 37.5 hours a week. Given that they were not provided with work from the 7 July onwards, failing to provide them with this work was a breach on the part of the respondent.

22. I make these findings about each claimant's loss in respect of that breach.

23. Turning to the first claimant, the pay that she should have been paid for in June is £2,663.99 net (see page 375). This is not how her loss has been set out in the schedule of loss: there she has claimed for the sum on her June payslip and, in addition, for the period 16 to 31 May. However, I find that the June payslip in fact covers the period from 16 May to 15 June. I then need to calculate the first claimant's loss from 16 June to 7 August, when the employment terminated. This is a period of seven weeks and three days at a rate of £2,734.31 per calendar month. I calculate that to be £4,795.60. She has received a payment of £2,808.96 from the Insolvency Service. Adding together £2,663.99 and £4,795.60 gives the wages due for the whole of the period 16 May to 7 August from which I deduct the sums received. This means that her loss for breach of contract and the award for breach of contract for unpaid wages is £4,650.63. I accept the figure claimed in her schedule of loss as balance of notice pay due and that is £284.00.

24. In respect of the second claimant, she was also on an hourly rate of £15.00 per hour, (see the payslip at page 379). Page 382 is her June 2017 payslip showing that she should have been paid £1,852.41 for the period 16 May to 15 June 2017. In addition, her damages for breach of contract for 16 June 2017 to 7 August 2017, when she would have worked comparable hours to those which

she had worked previously, I find to be seven weeks and three days at £629.74 per week, which comes to £4,793.03. This makes loss of earnings for 16 May to 7 August 2017 of £6,645.44. From that should be deducted the £2,808.96 that she has been paid by the Insolvency Service. I find that her damages for breach of contract are £3,836.48.

25. In respect of the third claimant, he was paid an hourly rate of £15.00 per hour gross (see page 389). He should have been paid the sum of £2,703.30 for the period 16 May 2017 to 15 June 2017 (see payslip at page 389). From the period 16 June 2017 to 7 August 2017, I award seven weeks and three days loss of earnings at the monthly net rate of £2,899.43, this makes a sum of £5,085.16, but from that needs to be deducted the sum that he has received from the Insolvency Service and which was £2,808.96. Therefore, his damages for breach of contract are £4,979.50.

26. So far as the claim in respect of annual leave accrued but not taken on termination of employment is concerned, it can be seen from the contracts in respect of each claimant that the holiday year was from 1 April to 31 March. There is no contractual provision for any carry over, so between the start of the holiday year of 1 April and the termination of employment, 7 August, approximately four months of the year had elapsed or a third of the holiday year and that is the amount that is claimed.

27. The payslips of the first claimant show that she had not taken any leave during the leave year 2017/18 and I award the sum claimed of £284.00.

28. However, it appears that the second and third claimant had taken or been paid for some annual leave. The third claimant's payslip at page 387 shows that during the period ending 15 May 2017, he had taken 7.3 hours holiday (or had been paid for that period of leave) and on page 389 the next month to 15 June shows that he had taken or been paid 36 units and that is a total of 43.3 hours. If you calculate the number of hours accrued holiday that is in a third of the year, by doing 5.6 weeks x ⅓ x 37.5 hour week, he had accrued 69.99 hours at the time of the effective date of termination. From that must be deducted 43.3 hours, leaving 26.7 hours remaining. It is clear that he has already been paid that at least by the Insolvency Service and so his claim for annual leave accrued, but unpaid on effective date of termination is dismissed.

29. In respect of the second claimant, if you look at page 380 she had either been paid for or taken 67.5 hours' leave (or units as it is written on the payslip) and at page 382, 36 units meaning she had been paid for 103.5 units. She accrued, as had the third claimant, 69.99 hours at the effective date of termination and therefore she had taken or had been paid for more annual leave than she had accrued and her claim for unpaid annual leave is dismissed.

30. I comment at this point that the second claimant's evidence was that she had bought her annual leave, which suggested that she had taken pay rather than that she had been paid for holiday and I comment that it is not clear to me that that was in accordance with either good or lawful employment practice. However, it seems to me when calculating the amount of any claim for unauthorised deduction from wages, I should nonetheless take into account

that the second and third claimant have already been paid in respect of that annual leave.

31. Turning then to the claim for protected award, under section 188 of the Trade Union Labour Relations Consolidation Act 1992, which I shall refer to as the 1992 Act. This applies when there are a minimum number of potential redundancies. There is a duty on the part of the employer to consult, if they are proposing to dismiss 20 or more employees at one establishment within a period of 90 days or less. By section 188(1A), the minimum period of consultation is at least 30 days. If they fail to consult in accordance with that provision, and I conclude that such is the case, then under section 189(2) the tribunals shall make a declaration to that effect and may make a protective award for such period as is just and equitable.

32. As I have already said, there were three premises operated by this respondent and for reasons that I have explained elsewhere, I accept that as at 7 July 2017, the respondent intended to make at least 20 employees redundant from 3-4 Foxley Lane and those included the first, second and third claimants, who were in fact then made redundant. Therefore, a duty to consult arose. The question is then what consultation, if any, was there. As a matter of fact the claimants knew that the residents were leaving the home. It is a credit to them and to the best standards of their profession, to which I am sure that they adhered, that they carried on providing care to residents who were in great need at a very vulnerable time.

33. It is apparent from the email sent by the Consultant Clinical Psychologist at page 101a, that they had been meeting in order to put plans together to ensure continuity of care and properly discharge the patients and residents when their own situation was extremely uncertain. Looking at page 100, the email from Siobhan Kilmurray, it is apparent that the respondent did have a HR function and I conclude from that and from the policy that was provided to the claimants with the at-risk letter that the respondent did know what their responsibilities were and in fact had a policy in place to deal with it.

34. On 23 May, the first claimant met with the Consultant Clinical Psychologist, and following that meeting the Clinical Psychologist wrote an email (page 101a) in the presence of the first claimant which included the following statement which was highlighted in bold and underlined.

> "Of some concern however is the fact that the staff who are on duty today and were present for the patient meeting asked why a meeting for them has not been arranged to tell them officially that the units are closing, please can you kindly explain what is happening about this. Of greater concern is what assurance we will be having about how and when we will get paid from the next cut-off period for pay from 15 May until the units close. I am gravely concerned that we are expected to care for patients and convene CPA meetings in accordance with good clinical governance when there is no planned meeting with staff to officially notify them of what is happening or anything in writing such as a letter to notify us that the business is closing. By law we require this, we require to be given assurance that we will be paid until the units close and also to be informed about our redundancy entitlements. I am concerned that there is a real danger that staff may not come to work and standard of clinical governance will not be adhered to if these matters remain unresolved."

35. This followed an email that is at 101 from Ms Kilmurray to the first claimant, amongst others, in which she asked for all staff at 3-5 Foxley Lane to convene at a meeting at 2pm on 16 May. This was to be with David Khan, a director of the respondent company. According to the first claimant, the meeting did not take place because David Khan did not turn up. Despite the very clearly worded letter from Dr Nagi at 101a, nothing happened. On 28 June, over a month later, the first claimant emailed Mr Kahn herself (page 105) saying that she tried to telephone him a few times and that he needed to come in for a discussion with all the staff involved. She generally reminding him of his obligations and asked what the situation was going to be for the staff. Although the staff knew that that home was closing, they were not informed about what the consequences for them would be.

36. The at-risk letter at page 112 said that consultation was starting but, by then, the home had been closed and there was no follow-up meeting in anyway. In fact, the respondent was insolvent and it may well be that it was unable to trade, but it has not defended the claims on that basis. I have not been given any explanation for that failure to convene the meetings proposed in the at-risk letter. I therefore concluded that there was a breach of a duty to consult. The respondent was aware of its obligations. I take account that it may well have been a distressing time and if it was prioritising the needs of vulnerable residents then I could understand that. However the staff needed information, they were asking for information and they received none. The only step taken was the letter of 6 July. I cannot ignore that letter and therefore concluded that it does provide some mitigation of the otherwise total failure on the part of the respondent to consult with the claimants and their colleagues and I therefore decided it would be just and equitable to set a protective period of 80 days.

37. Based upon the wages earned by the respective claimants, as claimed in the schedules of loss, the protective awards are calculated in the manner set out in the above judgment.

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Employment Judge George

Date: …14 May 2018……..

Sent to the parties on: .....

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For the Tribunal Office