EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Agbeze	**v**	**Barnet, Enfield & Haringey Mental Health Trust**

Heard at: Watford **On**: 16 May 2019

Before: Employment Judge Smail

Appearances

For the Claimant: In person
For the Respondent: Mr Kennedy, Counsel

PRELIMINARY HEARING

JUDGMENT

1. The claimant has materially complied with the Order of Employment Judge Manley dated 31 January 2019.

2. The claimant proceeds as a claim of unauthorised deductions from earnings only.

3. The claimant confirms that he brings no claim of race discrimination.

ORDERS

1. Statement of remedy / schedule of loss

1.1 The claimant must provide to the respondent by **7 June 2019** a document – a "Schedule of Loss" – setting out what remedy is being sought and how much in compensation and/or damages the tribunal will be asked to award the claimant at the final hearing in relation to each of the claimant's complaints and how the amount(s) have been calculated.

1.2 If any part of the claimant's claim relates to dismissal and includes a claim for earnings lost because of dismissal, the Schedule of Loss must include the following information: whether the claimant has obtained

alternative employment and if so when and what; how much money the claimant has earned since dismissal and how it was earned; full details of social security benefits received as a result of dismissal.

1.3 The parties are referred to: the Presidential Guidance on pension loss at *www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-pension-loss-20170810.pdf*;

2. Disclosure

2.1 The claimant to disclose a list of documents and the respondent to disclose a list and copy documents by **28 June 2019.**

3. Final hearing bundle

3.1 By **19 July 2019**, the parties must agree which documents are going to be used at the final hearing. The respondent must paginate and index the documents, put them into one or more files ("bundle"), and provide the claimant with a 'hard' and an electronic copy of the bundle by the same date. The bundle should only include documents relevant to any disputed issue in the case [that won't be in the remedy bundle referred to below] and should only include the following documents:

- the Claim Form, the Response Form, any amendments to the grounds of complaint or response, any additional / further information and/or further particulars of the claim or of the response, this written record of a preliminary hearing and any other case management orders that are relevant. These must be put right at the start of the bundle, in chronological order, with all the other documents after them;

- documents that will be referred to at the final hearing and/or that the Tribunal will be asked to take into account.

In preparing the bundle the following rules must be observed:

- unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is relevant to the case or authenticity is disputed) only one copy of each document (including documents in email streams) is to be included in the bundle
- the documents in the bundle must follow a logical sequence which should normally be simple chronological order.

4. Final hearing preparation

4.1 **On the working day immediately before the first day of the final hearing** (but not before that day), by **12 noon**, the following parties must lodge the following with the Tribunal:

4.1.1 Three copies of the bundle(s), for use by the tribunal at the full merits hearing.

5. Witness statements

5.1 The claimant and the respondent shall prepare full written statements containing all of the evidence they and their witnesses intend to give at the final hearing [and must provide copies of their written statements to each other on or before **6 September 2019.** No additional witness evidence will be allowed at the final hearing without the Tribunal's permission. The written statements must: have numbered paragraphs; be cross-referenced to the bundle(s); contain only evidence relevant to issues in the case. The claimant's witness statement must include a statement of the amount of compensation or damages they are claiming, together with an explanation of how it has been calculated.

6. Listing of Hearing

6.1 All issues in the case, including remedy, will be determined at the Employment Tribunal, Radius House, 51 Clarendon Road, Watford, Herts WD17 1HP over two days on **20 and 21 February 2020**, unless heard earlier at the Amersham Law Courts. The parties will be informed if that is the case.

REASONS

1. By a claim form presented on 20 June 2018, the claimant claimed that he had been subject to an unfair suspension and unequal treatment in that on 22 January 2018, he claims to have been unfairly suspended for a period of four months or so, relating to an incident on 13 December 2017 involving a permanent member of staff who apparently assaulted a patient. The claimant works at a mental health unit run by the respondent.

2. The claimant says he sounded the alarm, that members of staff came running, including senior members of staff, to assist him in breaking up the altercation and he reported matters to his manager, Mr Sonny Opara who was a registered mental health nurse. The claimant is a health care assistant. The member of staff who allegedly assaulted the patient was also a health care assistant. He was a permanent member of staff - the alleged assaulter. The claimant is a member of the bank staff.

3. The claimant has a grievance which is that he feels strongly that he should not have been suspended whatsoever. First, because he sounded the alarm in assisting the fight to stop and secondly that he reported matters to his line manager, Mr Sonny Opara. He understands that at some point criticism was made of him for not reporting the matter on the computer system, but he did not have access to the computer system to make such reports. His line manager did and he pursues this claim because he has a strong sense of injustice.

4. Prior to the suspension he had worked for eight months, receiving £4,000 per month, or so, each month, gross. After his suspension was lifted, after the four months, he continued to earn £4,000 per month and does up to this day. He submits that this suspension cost him £16,000. He submits that the pattern of work before and after shows that he would have received the same amount of work during the period of suspension.

5. The sense of grievance is clear, the difficulty is to analyse the claimant's case in terms of a cause of action before the Employment Tribunal. The respondent in its response assumes that the case is attempted to be brought as a claim of unauthorised deductions from earnings. It says that by reason of the terms of its contract with the claimant, that claim does not get off the ground. First of all, it says that the way in which the claimant is paid means that there is to be treated a new contract on each day he works, not a running contract so that each time he is asked to work, that amounts to in fact a new agreement. Furthermore, there is an express power to suspend under clause 13, disciplinary issues. That clause reads as follows:

> "During periods of bank work under this agreement you will not be subject to the Trust's disciplinary policy. However, in cases where there are issues of professional or personal misconduct, a brief investigation of the issues will be carried out and your ability to work on the bank may be reviewed in accordance. As a precautionary measure your account may be suspended in the interest of protecting you, other staff and/or patients. Where the information is found to warrant further action, you may be removed from the bank and/or the professional regulatory body may be informed if deemed necessary to protect patients' safety."

6. That event, of course, did not happen because the suspension was lifted. Ms Bahara of the Trust investigated the matter and noted that the claimant was claiming that he had informed his line manager, accepted that the claimant did not have access to the computer system and indeed recommended following this that all employees, including bank workers such as the claimant, do have access to the relevant system. She noted evidentially that the line manager, Mr Opara, appeared to be saying that he had no recollection of the matter being reported to him and nonetheless she recommended that the suspension be lifted. That was not sufficient for the claimant however. As I say, he has a burning sense that he should not have been suspended in the first place, so losing £16,000.

7. Be that as it may, the respondent submits that given the terms of the contract, the claim does not work. They accept he is a worker, they dispute he is an employee; that particular matter is not relevant because even if he were an employee, he would be serving employee and would not be able to claim breach of contract before the Employment Tribunal. They submit that as an unauthorised deductions claim, this does not get off the ground.

8. At an earlier preliminary hearing in front of Employment Judge Manley, she saw there was potential force in that submission and she ordered on 31 January 2019 under powers confirmed under rule 27 of the Rules of Procedure that having considered the file and heard from the claimant she was of the view that the claim had no reasonably prospects of success

because the claim form disclosed no cause of action why the Employment Tribunal has jurisdiction. She further ordered, in effect, an Unless Order that the claim will stand dismissed on 20 February 2019 without order, unless by that date, the claimant had explained in writing why the claim should not be dismissed.

9. On 19 February 2019, in time, the claimant submitted a detailed witness statement explaining what he says happened. In terms of the reporting, he says this, at paragraph 14 of his witness statement:

> "Subsequently the claimant complied with all known NHS safeguarding protocol incident report obligations because he informed the nurse in charge and even put himself in harms' way by attempting to prevent a permanent member of staff assaulting a vulnerable patient. What the respondent did was to hastily suspend the claimant without asking any questions at all but alleged that the claimant is on suspension because he did not report the incident as per the defendant's grounds of resistance in paragraph 11. This is false in all its ramifications because the claimant reported the said incident, in fact on the face of it the respondent ought to have commended the claimant for his swift response but did not".

In a further document, dated 28 February 2019, the claimant argued as follows:

> "The claimant gave a verbal report of this incident to the nurse in charge of the shift but was unable to record this altercation as an incident on the respondent's computer system. This is because the claimant has no real computer access which the respondent failed to provide. The claimant reported this incident to the nurse in charge who ought to have opened an incident report in line with NHS safeguarding compliance but failed to do so, which is clearly incompetence that the respondent is accommodating and it may well in future result in death or damaging consequences if not fully investigated. Therefore, this case ought to be heard wholly and the respondent be blamed for the nurse in charge's shortcomings, incompetence and non-compliance of NHS safeguarding regimes.

10. Accordingly, today has been listed for me to assess whether there has been material compliance with Employment Judge Manley's Order. I have heard submissions from both sides, the claimant has reiterated his position and said why should he be the victim of the respondent's negligence, as he puts it; the respondent maintains its submission that by reason of the terms of the contract, this claim does not get off the ground. Section 13 is not the same necessarily as a breach of contract claim. The claimant cannot argue breach of contract because I do not have jurisdiction even if he were a serving employee.

11. What the claimant has to do is to submit that there was in effect a breach of the following sentences of paragraph 13 of his contract, it says:

> "in cases of professional, personal and misconduct occur, a brief investigation of the issues will be carried out and your ability work may be reviewed in accordance"

12. He effectively submits that any brief investigation ought to have demonstrated that he sounded the alarm and reported the matter to his line manager. On any view, he submits, four months is not a brief investigation. Next there is the sentence:

> "as a precautionary measure, your account may be suspended in the interests of protecting you and other staff and patients"

13. I accept the respondent's analysis that as far as this is a discretionary provision, then that power would need to be exercised rationally. The claimant in his insistence that there has been negligence on the part of the respondent is in effect saying that that power to suspend has not been exercised rationally.

14. I find it difficult to determine with any degree of certainty at a preliminary hearing such as this, whether such an argument, if right on the facts, nonetheless cannot dovetail into a section 13 claim along the lines that if a rational exercise of the respondent's powers here would necessarily have acknowledged that the claimant sounded the alarm and reported the matter to his line manager, then there was no rational basis for a suspension and the failure to provide work and pay. That to my mind is difficult, I do not feel able today, at a preliminary hearing, when there has been passing but not detailed reference to the law in circumstances where there are no findings of fact as to what actually happened and those findings of facts what actually happened may be important.

15. In all those circumstances, I cannot say with confidence that this claim is unarguable. On the contrary, it seems to me that there is something to look at. The facts need to be found, what happened, a proper interpretation of the inter-relationship of the contract with sections 13 and 27 of the Employment Rights Act needs to be undertaken. To my mind the claimant maintaining his position, in no uncertain terms, that there was no basis to suspend him does materially comply with Employment Judge Manley's Order because the cause of action identified as the respondent acknowledges is section 13 of the Employment Rights Act 1996 and it requires a full hearing on fact and law to determine the just outcome. I am uncomfortable about striking this case out at this stage without those matters taking place. Furthermore, it is my judgment that the claimant has materially complied with Employment Judge Manley's Order dated 31 January 2019.

16. It may be, after looking at the evidence, after looking at the disclosure, after taking into account all those matters, that Mr Kennedy's prediction as to what the eventual evidential position is, may be right. That is to say, that the Trust acted rationally in suspending. However, I do note the fact that the claimant sounded the alarm. I do note that this attracted employees, including senior managers to intervene in the occasion. I note that it was accepted that he did not have access to the computer system upon which safeguarding reports are meant to be made and that that was all introduced after the period of suspension. It is going to be important, without doubt,

what the quality of evidence was on the 'brief' investigation that the respondent had to carryout following this event as to what the claimant did in relation to his line manager.

17. It may be that Mr Kennedy's prediction as to the findings of fact will be right. But this is a preliminary stage; there is an attempt to strike this matter out without hearing the evidence. I am uncomfortable about that for the reasons given. It is possible that it was clear that this claimant did all that was responsibly open to him at the time and that there was an irrational exercise of the discretion to suspend him. I have little doubt that the suspension caused him to lose £16,000 because there is a clear pattern of work before and after that is not affected by the contractual position, in my analysis, that there is a new contract for each day. If there was a breach of the power to suspend him by reason of irrational conduct and if that breach is relevant to section 13, then it is not difficult to see that the loss flowing from that is £16,000. The Claimant was willing and able to work throughout the period of suspension.

18. Accordingly, it is my judgment that the claimant has materially met Employment Judge Manley's Order and that to do justice to this case, there has to be a factual enquiry and detailed consideration of the applicable law. In terms of a listing I was prepared to list this for one day, Mr Kennedy has urged me to list it for two days to do justice to the complexity of the case. I am not going to disagree with Mr Kennedy about that. I will now go on to list the case for a two day hearing and to discuss other case management orders.

19. In the alternative, the respondent reminds me that its application was for a deposit on the basis that the claimant has little reasonable prospects of success. To my mind there needs to be an evidential enquiry. If, after the evidence is heard, it does appear that there was a body of evidence to show that the claimant did all that he was meant to do at the time of the altercation, and I say again, it seems common ground that he sounded the alarm, then there may be a reasonable argument for him to claim this amount. It is too early to say his prospects of success are only little. At this stage, I do not exercise any discretion to order a deposit. This case needs an evidential enquiry.

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Employment Judge

Date: …10.06.19……..

Sent to the parties on: ..13.06.19.....

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For the Tribunal Office