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EMPLOYMENT TRIBUNALS

Claimant: Mr Y Gurung

Respondent: (1) Secured Guarding Limited (in voluntary liquidation)
(2) Mr J Hughes

Heard at: London Central

On: 18 & 19 June 2019

Before: Employment Judge Pearl

Members: Mrs D Olulode
Ms J Collins

Representation

Claimant: In person

Second Respondent: In person

JUDGMENT

- 1 The judgment on liability of 7 June 2017 is varied so as to revoke (paragraph 2) the judgment of victimisation in favour of the Claimant and to substitute the following:

“The claim of victimisation in respect of the dismissal fails and is dismissed.”

- 2 The liability Judgment is not otherwise changed.

- 3 The Corrected Remedy Judgment of 7 June 2017 is reconsidered of the Tribunal’s own motion and a new paragraph is added under the heading of Wrongful Dismissal as follows:

“ Wrongful Dismissal

The Respondent shall pay to the Claimant as damages for breach of contract the net sum of £4,005.00”

REASONS

1. This was the hearing of Mr Hughes's application to reconsider the Judgment of 7 June 2017, as corrected in relation to remedy on 8 June 2017. Mr Hughes has previously succeeded in showing that he was never served with the proceedings. This application has involved both he and the Claimant giving evidence. Mr Hughes, in particular, answered a sizeable number of questions posed by the tribunal. His attendance has enabled us to take a more detailed view of the chronology that led to dismissal. It has also meant that we can investigate the decision maker's mind in relation to the dismissal. This could not be done in 2017. On the victimisation issue, which is the principal matter before us, the tribunal at that time found the dismissal to be victimisation as a matter of inference. We also found for the Claimant on claims of harassment and unfair and wrongful dismissal.
2. We need to note that the interpreter did not attend on the second day of the hearing, when the parties were due to make closing submissions. We decided that the best way to proceed was to invite them to submit these arguments in writing. The Claimant agreed and he said to us that he was more fluent in writing, a fact that is borne out by the many documents he has submitted to the tribunal over the years as well as the final submissions..
3. We also note that we were able to find either in the file, or to obtain from the parties, the relevant documents for this reconsideration hearing.

Victimisation

4. The Claimant was dismissed verbally on 4 February 2015. A letter of dismissal was sent on 5 February and a further letter was sent by Mr Hughes on 19 March. In our reasons dated 27 June 2017 we dealt with the chronology from 14 October 2014 up to dismissal in paragraphs 16 to 25. Those factual findings remain secure, although we now have a little more relevant detail.
5. It is plain that by autumn 2014 the Claimant was in dispute with colleagues and that he documented his grievances by writing to Mr Hughes. Mr Hughes, in our estimation, has a good recollection of many of these events and he was convincing in describing the procedure that he followed on receipt of complaints from the Claimant. He would investigate by taking statements from others.
6. A further general point to be derived from his evidence is that he was well disposed towards the Claimant, even though he needed to take up time with his various complaints. Mr Hughes told us that the Claimant was probably the best security guard he knew, because he was meticulous in the way that he carried out his duties, albeit he was also inflexible and followed what he regarded as the letter of the rules without any deviation. This had led Mr Hughes to speak up for the Claimant on more than one occasion, because he did not want to lose him from the workforce. This is evidenced, for

example, by his expression of hope in the 16 October letter that everyone could work together. He said much the same in the letter of 18 December. In a section we did not cite in the earlier decision he said: "I will speak with you at least once a week to monitor how you are progressing in your attitude and trust I will find ... improvement ... that way we can have a long and good relationship."

7. After one of the disputes, he gave his findings to the Claimant with Mr Thomas present and they shook hands at the conclusion of the meeting. The Claimant agrees.
8. We also note that in these exchanges, by October 2014 the Claimant had made allegations of race discrimination against colleagues. This has some bearing on the victimisation alleged and we will return to this.
9. For the chronology from December 2014 to February 2015 we refer to our earlier findings at paragraphs 20 to 24. As we noted, Mr Hughes interviewed employees on 10 January.
10. There was a further incident on 27 January and the Claimant alleged that Mr McFarlane had either assaulted him or gone to assault him. There is uncertainty over whether Mr Hughes received the letter the Claimant wrote to him on 28 January. He thought he had not received this before 4 February and he speculated that it may have gone to one of the other directors. A relevant point is that it is only at the end of this letter that the Claimant said "this is discrimination", an observation he had often made in previous correspondence. In other words, the letter called for another investigation by Mr Hughes, but was not otherwise different from other grievances the Claimant had raised against colleagues. As to whether Mr Hughes saw the letter before dismissal, the tribunal accepts his evidence that he probably did not and, in particular, notes that he gave this piece of evidence to us in what appeared to be an honest way. He appeared to be surprised to read the letter when it was shown to him.
11. One qualification to our earlier findings (paragraph 22) is that the 4 February 2015 meeting was to give the Claimant the result of the grievance that Mr Hughes had been investigating in January. It was not a grievance hearing at which the Claimant was to be asked for his views. Nor was it a disciplinary meeting, as suggested by the ET3.
12. The document we admitted as C2 has the two complaints about the Claimant to Mr Hughes dated 31 January and also the supporting statement of Mr Clarke of the same date. These were not referred to in our previous reasons. The statements allege aggressive and irrational behaviour on the Claimant's part. We need to emphasise that we make no findings about what happened on 30 January. The significance of the emails is that they corroborate Mr Hughes's evidence (a) that he spoke to those two officers and (b) that he told the Claimant at the outset of the meeting on 4 February that he had investigated these allegations against the Claimant: see our earlier paragraph 25 and the references to the letter of 19 March. We accept that Mr Hughes realised that he needed a further meeting at which the Claimant could put his side of the story. We find, on a consideration of all the evidence, that if matters had ended there, the Claimant would never

have been dismissed on 4 February; and may never have been dismissed thereafter.

13. The essence of Mr Hughes's account is that he believed that what the Claimant on 4 February told him about the incident amounted to an admission of acting aggressively towards Mr McFarlane. Moreover, he was able to give a graphic account of the Claimant's demeanour after Mr Hughes gave him the outcome of the grievance. He was shouting and banged the table. Mr Hughes says he also leapt out of his chair and Mr Hughes feared that the Claimant might hit him. He gives the detail that the trade union representative tried to calm the Claimant down and asked to have a private word with him. The Claimant himself has said that in private the representative thought he might want to resign before he got dismissed and he has complained to the union about that. It is, therefore, likely that the Claimant did lose control and that Mr Hughes has recalled the events of that day accurately. There are other details that Mr Hughes gave that are credible and which suggest his account is correct. At least one security guard was called to escort the Claimant from the premises.
14. Mr Hughes, further, spoke to the Director, Mrs Mansi, who had heard the noise and has asked what was happening. He remembers going into her office, indeed maintains that the Claimant saw this happening. She told Mr Hughes to dismiss the Claimant. He says he would not have done so, if it was his decision, because he knew him well. However, he dismissed him because he was told to do so. When he wrote the letter of dismissal, he alighted on the admission, that he maintains he had heard the Claimant make, as the reason for dismissal. He did not refer to the Claimant's violent behaviour. In our view, the evidence shows that he found it simpler to rely on the alleged admission.
15. The letter of dismissal also corroborates another contention of Mr Hughes, which is that he felt sorry and thought the Claimant needed help. The letter stated: "as I stated yesterday, should you decide to seek medical help and undergo treatment for your anger and temper, I would be willing to give serious consideration to re employing you." There is no real prospect that this has been made up after the event. It was something raised on the day in front of the union representative and then repeated the next day in a letter.
16. All of the evidence we have accepted takes the dismissal away from the protected act in the Claimant's last letter of 28 January or the earlier protected acts. In relation to those earlier matters, Mr Hughes clearly bore no animus towards the Claimant and hoped that matters at work would calm down. Mr Hughes's evidence about what happened on 4 February, in its totality, removes as a reason for dismissal any protected act. The Claimant's own evidence is that there was a long-standing conspiracy to remove him from the business and that Mr Hughes was part of this. This does not match the objective evidence, including what Mr Hughes had written to him. The final suggestion of reemployment also militates against victimisation because of a protected act. In all the circumstances, we consider that Mr Hughes has succeeded in showing that the protected acts had nothing to do with the reasons for dismissal.

17. In coming to this conclusion we have considered the parties' written submissions. The Claimant states that the letter dated 4 February was written about a month later and backdated. This comes in as a new allegation that Mr Hughes was not challenged about. It seems unlikely. The Claimant's submissions make clear that he is for various reasons aggrieved by the decision to dismiss him, but this falls far short of victimisation within the meaning of section 27. He makes a number of other criticisms of Mr Hughes's behaviour, but these do not advance the claim for victimisation under the Equality Act.

The harassment claim

18. This is paragraph 4 of the judgment. The claim succeeded against both Respondents concerning remarks made by Mr Hughes. The factual allegation and the remark are set out in paragraph 16 of our earlier Reasons. Mr Hughes's statement denies the harassment in a short sentence. In evidence he said; "I would not have used the term 'mental problem'. I cannot deny it, but would say [or have said] 'anger management.'" Our conclusion here is that Mr Hughes has difficulty in remembering and has honestly conceded, in effect, that he might have used the words, although he believes he did not. The Claimant, of course, raised the complaint the next day. We have insufficient evidence to displace our earlier finding and it is not, therefore, disturbed.

Reconsideration: our own motion

19. On 19 June we wrote to the parties and said we wanted to reconsider the question of wrongful dismissal, in the event that the victimisation judgment was set aside. This claim succeeded, but no separate remedy was awarded because the compensation overlapped with the tortious damages. Now that this part of the judgment has gone, the Claimant is entitled, in our view, to damages in the sum of £4,005, 9 times the net weekly wage of £445.

Employment Judge Pearl

Date 9 August 2019

REASONS SENT TO THE PARTIES ON

19 August 2019

FOR THE TRIBUNAL OFFICE