EMPLOYMENT TRIBUNALS

Claimant: Mr A Abdi

Respondent: Sidwell Regeneration Ltd
(In Creditors Voluntary Liquidation)

Heard at: Nottingham **On:** Monday 23 September 2019

Before: Employment Judge Rachel Broughton (sitting alone)

Representation
Claimant: Mr Heard of Counsel
Respondent: No Appearance and no representation

RESERVED REMEDY JUDGEMENT WITH REASONS

The Tribunal having issued a Default Judgment under Rule 21 on 4 September 2019 the Tribunal has gone on to deal with the issue of remedy and determine the effective date of termination. The Judgment of the Tribunal is;

1. That the effective date of termination is 17 November 2018

2. The Respondent is ordered to pay to the Claimant compensation for in accordance with the schedule set out below.

Background to this Hearing

1. The claimant issued a claim received by the tribunal on 4 April 2019 which included claims of unfair dismissal under section 98 Employment Rights Act 1996 (ERA), a wrongful dismissal claims and a claim for unlawful deduction of wages pursuant to section 23 (1) ERA in relation to unpaid holiday pay.

2. The respondent was named on the original claim form as Brit Sec Staff Services Limited. The response was due to be filed by 22 June 2019. No response was received by the tribunal.

3. The file came before Employment Judge Heap on 26 June 2019 to consider whether to issue a Rule 21 default judgment. Employment Judge

Heap identified that Brit Sec Services Limited appeared to have registered a change of name at Companies House to Sidwell Regenerations Ltd registered number 7150726. The claimant representatives were notified and asked to confirm whether they agreed that Sidwell Regenerations Ltd was the correct respondent. The claimant confirmed by letter of the 25 July 2019 that Sidwell Regenerations Ltd registered number 7150726.was indeed the correct respondent and also notified the tribunal that the respondent had entered into creditors voluntary liquidation, the insolvency practioner being Andrew Fender of Levy Gee, 9 Portland Road, Egbaston, B16 9HN.

4. The tribunal allowed an amendment to change the name of the respondent

5. The ET3 was re- reserved on the respondent with a revised date of the 2 September 2019 for receipt of the response by the tribunal.

Default Judgment

6. No response was filed by the 2 September 2019 a Rule 21 Default Judgment was made on the 4 September 2019 by Employment Judge Heap.

7. The hearing listed for 23 September 2019 was converted to a Remedy Hearing with a reduced time estimate of 3 hours.

8. It was necessary to hear evidence to determine the effective date of termination before deciding on remedy.

The law

9. The definition of the effective date of termination for the purposes of an unfair dismissal claim is set out at section 97 (1) ERA and the relevant provisions are as follows;

Subject to the following provisions of this section, in this Part, "the effective date of termination "–

(a) In relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee means the date on which the notice expires
(b) In relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect

10. The burden is on the employee to show a dismissal where the employer does not accept that there has been a dismissal, the applicable standard of proof is that of the 'balance of probabilities'.

11. The claimant in this case does not rely on what was said but what was communicated in the text communications to him and principally in the text message of the 17 November 2018. The text message was not without

ambiguity, however I am assisted in this matter by the **EAT in the case of Chapman v Letheby and Christopher Ltd 1981 IRLR 440** where Mr Justice Browne – Wilkinson said, in respect of the proper construction of a letter of dismissal as follows;

"First, the construction to be put on the letter should not be a technical one but should reflect what an ordinary, reasonable employee in Mr. Chapman's position would understand by the words used. Secondly, the letter must be construed in the light of the facts known to the employee at the date he receives the letter".

Mr Justice Browne – Wilkinson went to comment as follows;

"*Even if we are wrong in this view and the meaning of the letter is truly ambiguous, there is a principle of construction that words are interpreted most strongly against the person who uses them. We think this principle is peculiarly applicable to cases such as the present where an employer, by an ambiguous notice, may mislead the employee as to the effect of the document the responsibility for the wording of which lies entirely in the hands of the employer."*

Documents and Evidence

12. The claimant produced a bundle of documents which ran to 90 pages

13. The Claimant relied upon a witness statement dated 13 September 2019 which ran to 30 paragraphs.

14. The tribunal heard oral evidence from the claimant. His evidence was not challenged.

Findings of fact

15. The claimant date of birth is 17 February 1988

16. The claimant was employed by the respondent from 15 November 2007 following a TUPE transfer on 1 July 2017 from Unipart Services as a security officer.

17. The claimant's undisputed evidence was that from December 2017 his normal working hours consisted of two shifts of 12 hours each worked on a Friday and Saturday each week remunerated at the rate of £253.85 (gross). He would work additional hours as and when required which were remunerated at the same rate.

18. The claimant was a member of the NEST pension scheme in to which the respondent paid a contribution of £38.63 in the 3-month period prior to 11 November 2018.

19. The claimant was entitled to 28 days holiday per year. By the 11 November 2018 he had taken 4 days annual leave. The holiday year ran from 1 April to 31 March each year.

20. The claimant had taken annual leave on the 8 and 9 November 2018. The Operations Manager (referred to only by his first name of Simon, the claimant being unable to recall his last name and it not appearing on any documents) was unhappy about the claimant's request for leave but ultimately the leave was granted. When the claimant attended for work on the 16 November 2018 another security officer was on shift. The claimant contacted the control room, the other security officer was informed that he was not required and he left. The claimant had attempted to contact the Operations Manager, Simon before speaking with the control room, however he had been unable to make contact with him by telephone. The claimant worked and was paid for the shift he worked on the 16 November 2018.

21. The following day, on the 17 November 2018 the Claimant received a text message from the Operations Manager. A copy of this text message appears at page 55c of the bundle and which states;

    "Hi Ali, You are not on the roster for this week. ***You should not have been at work last night. Please don't attend for tonight or you will be sent home.*** *I will ring you on Monday to discuss the reason why. Regards Simon"*

22. 0n Monday 19 November the Operations Manager informed the claimant that the customer wanted a different security officer to man their site ie not the claimant. The claimant was told that the reason the customer had provided was; "*flexibility and attention*" to detail from the security officers. The claimant was told that he would not be working again until the issue was resolved.

23. On 22 November 2019 the claimant asked if he would get paid as he remained available to work, the Operations Manager replied that he would only be paid for hours worked and that he had been removed from the site due to performance related issues. No further details were provided regarding the alleged performance issues. The claimant was informed that there was alternative work but not in Coventry where the claimant was based. The claimant was informed that he was not on suspension. The claimant was told that other shifts were available within reasonable travelling distance. The claimant received no further contact from the respondent regarding the alternative shifts.

24. The claimant lodged a grievance on 22 November 2018, there was a hearing on 25 January 2019. The claimant was asked why he expected to be paid when he had not worked. The claimant was not informed of what the outcome of the grievance was.

25. No disciplinary or dismissal process was carried out with respect to the alleged performance issues. The allegations were not clarified, the claimant was not given an opportunity to respond to them, there was no hearing and no appeal process.

26. The claimant had not indicated in the claim form when his employment had ended. The claim form had indicated that the Claimant remained informed by the ticking of box 5.1 but the claim as presented to the Tribunal included a claim for unfair dismissal.

27. The claimant's oral evidence was that he understood the communication in the text message on the **17 November 2018** to be communication of dismissal and he did not in fact attend for work again after this date. His last day on site was 16 November 2018.

28. I heard submissions from Mr Heard which in essence was that the claimant was not pursing an argument that the effective date of termination was the 11 November 2018 but rather that it was the 17 November 2018. In support of this date counsel argued that termination can be communicated by words or conduct and that the email at page 55c of the bundle dated 17 November 2018 was reasonably understood by the claimant to be a termination of his contract and he did not work again. Counsel made alternative submission about a termination date of the 22 November 2018 if the claimant's primary case was not accepted. The 22 November 2018 was the date the claimant sent a text message to Simon asking if the meeting with the customer had gone ahead and whether he would still be paid as he was available for work and Simon had relied stating that the claimant would only be paid for hours worked and that "as it stands you have ben removed from site due to performance related issues." . The text had gone on to refer to alternative work but not in Coventry. Counsel makes the point that the claimant had only ever worked at the site on Coventry.

29. Counsel made submissions regarding an uplift of an award for a failure by the respondent to comply with the ACAS code on disciplinary and grievance procedures. Which he described as a "wholesale failure".

30. The claimant was working under a contract of employment signed by him on the 2 December 2013 which provided for notice equivalent to the statutory minimum under section 86 (1) ERA and annual leave of 5.6 weeks during an annual leave year of 1 April to 31 March.

Conclusions

31. Applying the law to the facts of this case, with regards to the effective date of termination; the facts as known to the claimant following the text of the **17 November 2018,** was that, according to his undisputed evidence, he was not allowed to attend work and was told he would be sent home if he did so. His evidence under oath was that he understood that his employment had been terminated on that date.

32. It may be argued that the meaning of the text was truly ambiguous and the claimant's actions in seeking further clarity go to evidence that, however we are guided by Mr Justice Browne- Wilkinson in the Chapman case and

conclude that applying the burden of proof to the undisputed evidence of the claimant any ambiguity should be interpreted in his favour.

Mitigation

33. During the remedy hearing the claimant gave evidence regarding his mitigation.

34. The claimant commenced new employment on 18 March 2019.

35. The claimant had applied for other work before securing this new job in March 2019.

36. The claimant gave evidence that he had not been in receipt of any social security benefits and he has not applied for any payment from the National Insurance Fund.

37. The claimant worked core hours of 36 hours per week in this new job. He worked additional shifts, his oral evidence was that he worked on average 48 hours per week (an additional 12 hours on top of this core 36 hours). On July 2019 his hours reduced to 24 hours because he started a training course however he still covers additional shifts therefore his hours and pay are variable. He is paid £8.59 per hour. He travels to various locations. The schedule of loss which appears at 35- 41 of the bundle was not consistent with the claimant's evidence and calculations were based on a termination date of 11 November 2019.

38. I made an Order at the hearing that the claimant file and serve on the respondent further information including a revised schedule of loss calculated with reference to an effective date of termination of 17 November 2018, documents in support written representations setting out how the revised schedule of loss has been calculated to enable the Tribunal to determine the loss without the need for a further hearing.

39. A revised schedule of loss with evidence is in support was duly provided by the Claimant on 15 October 2019 and the respondent is ordered to pay to the Claimant compensation for unfair dismissal and outstanding holiday pay in the sum of £9,401.87 net as set out below.

SCHEDULE

Basic award	-	£2644.50
Compensatory award including 25% uplift		£6046.25 net
Holiday pay:		£711.12 net

Total £9,401.87 net

The Recoupment Regulations do not apply.

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Employment Judge Rachel Broughton

Signed 21 November 2019

Sent to the parties on:

For the Tribunal:

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