EMPLOYMENT TRIBUNALS

Claimant: Maciej Walkowski

Respondent:
1. Verona Food Limited
2. Ahmed Mahmood Iftikhar

Heard at: **Southampton** **On:** **2nd and 3 December 2019**

Before: **Employment Judge Dawson , Dr Thornback, Mr Crowe.**

Representation
Claimant: Mr Werenowski, solicitor
Respondent: Mr Ali, representative

Judgment having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided

REASONS

1. The claimant brings claims of non-payment of holiday pay, other payments and victimisation (or in the alternative harassment) against the 1st and 2nd respondents.

2. On 21 November 2019, the first respondent gave notice of intention to appoint an administrator pursuant to paragraphs 26 and 27 (2) of Schedule B1 Insolvency Act 1986. At the outset of the hearing, Mr Ali, representing both respondents, told the tribunal that he did not seek to argue that there was a moratorium on legal proceedings in respect of the first respondent.

3. At the outset of the hearing, the claimant applied to re-amend the Particulars of Claim to add, in paragraph 29, the words “and liable under section 110 of the Equality Act 2010”. We permitted that application on the basis that it simply set out in words the basis for the claim which had already been made against the 2nd respondent. It did not add an extra head of claim. In that sense it may be considered unnecessary but we felt it helpful for the

pleadings to be clear as to the basis on which the 2nd respondent was being pursued.

4. Shortly after the tribunal had spent time reading the papers in the case (about 11:40 on the first day) the tribunal received correspondence from solicitors acting for the agents of the first respondent stating that a moratorium was in existence. It was explained that for 10 working days after notice of intention to appoint an administrator was given, there is a moratorium on all proceedings against the company. Having considered the legislation it appeared to the tribunal that was correct. Mr Ali changed his position into one of seeking to assert that the moratorium prevented proceedings continuing against the 1st respondent. That moratorium would continue if an administrator was appointed.

5. In the circumstances, the tribunal had no option but to stay proceedings against the 1st respondent but, having considered representations of the claimant and 2nd respondent, we decided to hear the claim against the 2nd respondent. That was the preferred course of action of the claimant but the 2nd respondent sought to resist proceedings continuing against him on the basis that, under section 110 of the Equality Act 2010, the first respondent bears a higher burden and if proceedings are stayed against it, then they should also be stayed against the 2nd respondent.

6. Our reasons for hearing the case against the 2nd respondent were as follows.

7. We acknowledged that it may be possible, at some future point, for the claim to continue against the 1st respondent and that gave rise to a risk that, if the claims against the 1st and 2nd respondent proceeded separately, different tribunals could make inconsistent findings of fact. That is clearly undesirable.

8. We did not accept that in some way the operation of section 110 Equality Act 2010 meant that if the claim was stayed against the 1st respondent it was to desirable also to stay proceedings against the 2nd respondent; we did not follow the 2nd respondent's reasoning in this respect.

9. In favour of continuing with the claim against the 2nd respondent was that the claimant had been waiting for a considerable period of time to have his claim heard and the claim was ready to proceed to a hearing. The notice of intention to appoint an administrator by the company had only been served very close to the hearing and there was no evidence as to how long a moratorium might last.

10. We considered that the Equality Act 2010 provided for the 2nd respondent to be liable even if a claim could not proceed against the 1st respondent. Considering the overriding objective, not least the need to avoid delay and save expense, we concluded that it was appropriate to continue with the case against the 2nd respondent. It would not be fair to the claimant to be kept from the possibility of obtaining a judgment in respect of wrongs done to him (if such there were) simply because the 1st respondent had served notice of intention to appoint an administrator.

11. Apart from the claims under the Equality Act 2010, in his closing submission, the solicitor for the claimant confirmed that the claimant was only bringing a claim of breach of contract which was in respect of non-payment of wages at the rate of £8.50 per hour and non-provision of 40 hours work per week. A breach of contract claim could only be brought against the 1st respondent and so we have not considered it further.

12. We heard from the claimant and his witness, Ms Bojanowska and from Mr Iftikhar. Mr Iftikhar also sought to rely upon witness statements from Carlos Fijian and Joseph Gamble. We were told that Carlos Filian could not attend due to the need to visit his mother in Spain (who has stage IV cancer); we were not given any explanation as to the reason why Mr Gamble did not attend. We were not provided with any evidence as to when Mr Filian had travelled to Spain (or indeed any evidence that he had so travelled) and no attempt was made to use electronic means such as videoconferencing to permit him to be cross-examined, which is permitted by rule 46 of the Tribunal Rules of Procedure. Given the centrality of his evidence we have given little weight to his statement and, likewise, Mr Gamble's. Except where stated, in this judgment references to page numbers are to the bundle of documents.

Issues

13. The issues were set out in the Case Management Summary made pursuant to the hearing on 3 July 2019 and, in particular, paragraph 3 thereof. No application was made to amend the list of issues and, in the circumstances, we make our determination by reference to it.

Findings of Fact

14. The 1st respondent is a company which operated a Pizza Hut franchise based in Fareham. The 2nd respondent is described by the claimant as the controlling mind of the 1st respondent and he is shown at Companies House as being the sole director and person with significant control. The Confirmation Statement filed on 17 October 2018 shows that he is the sole shareholder and in his witness statement he describes himself as the director of the 1st respondent.

15. Prior to being employed by the 1st respondent, the claimant was employed by Zain Hut Limited which he described as being another Pizza Hut franchisee which was owned by ZS. We have not heard any evidence from ZS.

16. The claimant had worked as a manager for Zain Hut Limited and was successful in that role. He had been presented with several awards by the Pizza Hut franchisor and described himself as having turned the restaurant where he worked "around". We accept that evidence.

17. On 30 July 2018, the claimant presented proceedings against Zain Hut Limited in the Employment Tribunal asserting that he had been discriminated against on the grounds of his race. He stopped working for Zain Hut Limited on the same day.

18. We find that towards the end of his employment with Zain Hut Limited, the claimant's hours were reduced. In order to supplement his income, he started working for the 1st respondent as a delivery driver. The wage for delivery drivers was £7.83 per hour.

19. Initially, the claimant was not provided with a contract or wage slips and was paid "cash in hand". Shortly after starting work, he engaged in discussions with Carlos Filian , the 1st respondent's Area Manager. We find it likely, on the balance of probabilities, that Mr Filian was aware of the claimant's success whilst working for Zain Hut Limited. Mr Iftikhar told us that he was aware of the claimant's award when he started employing the claimant.

20. At page 53 of the bundle is a payslip for 3 August 2018, showing that the claimant was being paid £8.50 an hour. That payslip refers to the 2 weeks before 3 August 2018 and so covers the weeks commencing the 23rd and 30th of July 2018. The claimant told us, and we accept, that he had a discussion with Mr Filian whereby Mr Filian asked the claimant to be a manager for the 1st respondent on the basis that he would be paid £8.50 per hour and work 40 hours per week. We find the payslip to be evidence of that discussion and that that discussion took place around 23 July 2018. However, Mr Filian told the claimant that he would not introduce the claimant to the staff as a manager until 20 August 2018 when he returned from a holiday. Until then, the claimant was to carry on working as a delivery driver and, in the claimant's words, check what was going wrong in the store and what he would change.

21. On 1 August 2018, the claimant was presented with a contract for signature. The contract described him as a Manager, to be paid at a rate of £8.50 per hour with a normal working week of 40 hours (page 7). The version in the bundle purports to be signed by the claimant and Mr Filian. The respondent does not accept the validity of that contract. Mr Iftikhar's evidence was that a copy of that contract could not be found in the 1st respondent's office. However, nor could any other version of the claimant's contract be found. The witness statement of Mr Filian does not deal with the contract at all and does not deny that he signed it. We accept that the contract is genuine and was signed on the 1 August 2018. We find that it is evidence that the claimant was employed by the respondent as a manager and sets out the terms of the claimant's employment at that time. Whilst we note that the start date is given as 12 August 2018, we find that as a matter of fact, the claimant's employment as a manager was from around 23 July 2018 when he received his pay increase.

22. By 17 August 2018, the claimant's wage slips show, his rate of pay had been reduced to £7.83 per hour (page 52).

23. When Mr Filian returned from his holiday, the claimant was never given the opportunity to act as manager. Instead, on 30th of August 2018, whilst the claimant was driving with Ms Bojanowska, his partner, he received a telephone call from Mr Filian. In that call, Carlos Filian said that ZS and Mr Iftikhar were friends and both were Pizza Hut restaurant owners. He was told that unless he dropped the claim against Zain Hut Limited he would lose his job with the 1st respondent and had 2 weeks to decide.

24. The respondents' version of events is different. They assert that the claimant had been guilty of gross misconduct and was dismissed on 2 weeks' notice.

25. In his closing submissions, Mr Ali who appeared for the respondents (although, at this stage, only acting on behalf of the 2nd respondent) stated that the claimant had been repeatedly late for work and not turned up for work. That was a point put to the claimant in cross examination. However, when asked for precise particulars of when it was asserted that the claimant had not turned up for work or was late, Mr Ali could only refer to 2 dates before 30 August 2018, being (by reference to page 56A) 5 August 2018 (when the respondent says that the claimant was absent, but the claimant says he was not rostered to work) and 13 August 2018 (when the claimant was late by 15 minutes). Although he made additional assertions of absence between the 6 September 2018 and 9 September 2018, those absences cannot have been causative of the conversation on 30th August. In cross examination the claimant admitted to having been late on one further occasion before 30th August and page 57A does show lateness on 18th and 26 August 2018.

26. The respondents also rely upon an assertion that, in August 2018, the claimant was seen making a pizza using dough from the day before. It is asserted that drivers made pizzas in the morning, when shifts were quiet, to help out. It is asserted that was an act of gross misconduct.

27. We reject the suggestion that the claimant was dismissed either because of his lateness or his non-attendance or because (if he did) he made pizza using old dough on one occasion. We find that the claimant would have been dismissed without notice if the respondents genuinely believed him guilty of gross misconduct. We note that the respondents have served a witness statement from Joseph Gamble in this respect. Mr Gamble was the manager who allegedly witnessed the use of out of date pizza dough. It is surprising that he has not attended for cross examination and we give no weight to his statement in this respect.

28. Moreover, we were impressed with the evidence of Ms Bojanowska as to what happened in the conversation on 30th of August. She was a passenger in the claimant's car and the call was conducted on speakerphone. She told us that Mr Filian said clearly that unless the claimant dropped his action against Zain Hut Limited and ZS he would lose his job.

29. We think it likely that ZS and the 2nd respondent would know each other. They both operated Pizza Hut franchises in the same area and we accept the evidence of the claimant in respect of this telephone call.

30. Moreover, we find it unlikely that Mr Filian would have made the phone call unless he had been instructed to do so by the 2nd respondent. Further, having made the findings set out above, we find, on the balance of probabilities, that the reason why the claimant was not asked to fulfil the role of manager from 20 August 2018 was because, by then, the 2nd respondent was aware of the claim being brought against Zain Hut Limited and had spoken to Mr Filian and stopped him engaging the claimant as a manager. Likewise, we find that the reason for the reduction in pay to £7.83

per hour was because Mr Iftikhar had become aware of the claim being brought against Zain Hut Limited.

31. In reaching our conclusions we have given some weight to the fact that no attempt has been made to adduce live evidence from Mr Filian or adduce evidence that he is even in Spain. The telephone call is the central allegation in this case and it is a little surprising that the 2nd respondent has adduced no evidence in this respect beyond the written statement of Carlos Filian. The lack of such evidence is not, however, our sole or even our main reason for our findings. Those reasons are set out above.

32. The 2nd respondent asserts that he sent a letter of dismissal to the claimant on 31 August 2018. The claimant did not receive that letter and the 2nd respondent has no copy of it. We find it less than credible that the respondents would lose not only the claimant's contract of employment but also the copy of the letter of dismissal. We do not accept Mr Iftikhar's evidence in this respect.

33. On 5th of September 2018, the claimant emailed Mr Filian stating "you called me on 30th of September and said that I would only be able to work for your company for 2 more weeks and that after that there would be no more work for me. Please can you explain to me why there will be no more work for me?" We accept that the reference to September should have been to August. We accept the claimant's evidence that he did not want to record, precisely, what Mr Filian had told him, however we note that there was no reply to that email. Mr Filian did not suggest that there was a valid reason for the dismissal and we think it reasonable that the claimant would have sought to obtain some evidence as to what he had been told on the telephone by sending the email.

34. The claimant did not abandon his claim against Zain Hut Limited.

35. The claimant was unable to attend work on the 8th and 9th of September 2019 due to his car breaking down. However, he did attend on Monday 10th September. On that day, when he consulted the rota, it was apparent that he had been given no hours to work for that week. He states that he left because he was not on the rota any more, he had no work to do and would earn nothing. That is consistent with the claimant being told, on the telephone on 30th August, that he had 2 weeks to decide whether to abandon his case or continue his employment with the 1st respondent. Given that the claimant is not pursuing a claim of constructive dismissal in this case, we do not need to find whether, as a matter of law, the claimant was dismissed or not. We do find that from 10 September 2018 the claimant was not given and would be given no more hours of work. The reason for that was that he had not abandoned his claim against Zain Hut Limited.

Law

36. Section 27 of the Equality Act 2010 provides

    a. A person (A) victimises another person (B) if A subjects B to a detriment because—

i. B does a protected act, or

ii. A believes that B has done, or may do, a protected act.

b. Each of the following is a protected act—

i. bringing proceedings under this Act;

ii. giving evidence or information in connection with proceedings under this Act;

iii. doing any other thing for the purposes of or in connection with this Act;

iv. making an allegation (whether or not express) that A or another person has contravened this Act.

37. In every case the tribunal has to determine the reason why the claimant was treated as he was (per Lord Nicholls in Nagarajan v London Regional Transport). This is "the crucial question." It is for the claimant to prove the facts from which the employment tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and Ors v Wong)

38. In the victimisation case of Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830, Lord Nicholls considered that the test (must be what was the reason why the alleged discriminator acted as they did? What, consciously or unconsciously was their reason?

39. In Hewage v Grampian Health Board [2012] UKSC 37, the Supreme Court held "Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352 (para 39) it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

40. In deciding whether the claimant was subjected to a detriment we have had regard to the decision in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11 that, in respect of the definition of detriment,

> "As May LJ put it in De Souza v Automobile Association [1986] ICR 514, 522 g, the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.
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> But once this requirement is satisfied, the only other limitation that can be read into the word is that indicated by Brightman LJ. As he put it in Ministry of Defence v Jeremiah [1980] ICR 13, 30, one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the

circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment": Barclays Bank plc v Kapur (No 2) [1995] IRLR 87. But, contrary to the view that was expressed in Lord Chancellor v Coker [2001] ICR 507 on which the Court of Appeal relied, it is not necessary to demonstrate some physical or economic consequence. (Paragraph 34 to 35).

41. In Chagger v Abbey National Plc [2010] IRLR 47 the Court of Appeal held that " In assessing compensation for discriminatory dismissal, it is necessary to ask what would have occurred had there been no unlawful discrimination. If there were a chance that dismissal would have occurred in any event, even had there been no discrimination, then in the normal way that must be factored into the calculation of loss. The gravity of the alleged discrimination is irrelevant to the question of what would have happened had there been no discrimination" (taken from the head note).

42. Section 109 Equality Act 2010 provides as follows

(1) ...

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

43. Section 110 Equality Act 2010 provides as follows

(1) A person (A) contravenes this section if—

(a) A is an employee or agent,

(b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and

(c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

Conclusions

44. We state our conclusions by reference to the issues identified in the Case Management Summary following the hearing on 3 July 2018.

45. Although, initially, the claimant's case was that he started working for the 1st respondent on 12 August 2018, we accept that, in fact, his employment started as a delivery driver on 3 July 2018. The 2nd respondent produced no evidence to maintain his assertion that, in fact, the start date was 16 July 2018. Nothing turns on this point for the purposes of the claim against the 2nd respondent.

46. The contract between the claimant and 1st respondent was, initially, an oral contract for the claimant to be employed as a delivery driver at the minimum wage. Around the 23 July 2018 the contract was varied so that the claimant was to be employed as a manager at a rate of £8.50 per hour for a normal 40 hour working week. That contract was reduced to writing on 1st of August 2018 (page 7).

47. The question of constructive dismissal does not arise in the claim against the 2nd respondent and the claimant is not pursuing such a claim against the 1st respondent.

48. In respect of issue 3.4, the last day on which the claimant attended for work was 10th September 2018. He did not, actually, work on that day.

49. In respect of issue 3.5 the claimant was entitled to be paid £8.50 per hour from 23 July 2018.

50. In respect of issue 3.6 the claimant was obliged to work for 40 hours per week from 23 July 2018.

51. The claimant was employed by the respondent as a delivery driver up to 23 July 2018 and as a manager from then on, however it was agreed that the claimant would not act in the role of manager until 20 August 2018.

52. In respect of issue 3.8, the claimant was not given notice of termination by reason of a breach of contract by him in the respects set out therein (or any respect).

53. We do not find that any complaints were made by the 1st respondent about the claimant concerning his work.

54. In respect of issue 3.10, whilst we accept that the email of 5 September 2018 was sent by the claimant, we do not find that it amounted to a grievance. The claimant was not complaining about treatment but simply asking for an explanation for the telephone call on 30th August.

55. We were not able to make any clear finding as to whether the 1st respondent cut the claimant's hours to 20 a week. We were not presented with any specific evidence in that respect. We accept that it would have been reasonable for the claimant, in some weeks, to work slightly more than 40 hours a week and in some weeks to work slightly less. We do find that, from 10 September 2018 onwards, the claimant's hours were reduced to nil.

56. Issue 3.12 is an issue of remedy to which we will return.

57. In respect of issue 3.13 we find that the 2nd respondent did have knowledge of the claimant's claim against Zain Hut Limited.

58. We find that the 2nd respondent did impose a detriment on the claimant as a result of the knowledge of that case. The detriment was reducing the claimant's pay to £7.83 per hour, not allowing him to take on the role of manager and reducing his hours to nil from 10 September 2018. We find that in so doing the 2nd respondent was acting as agent for the 1st respondent (he was the 1st respondent's director) and his actions were done with the authority of the 1st respondent. Subjecting the claimant to a detriment because he had done a protected act (see the conclusion below) was a breach by the 1st respondent of the Equality Act 2010. Thus the 2nd respondent is liable to the claimant in this respect under section 110 Equality Act 2010.

59. In respect of issue 3.15, we find that the claimant's manager did tell the claimant that unless he terminated his claim against Zain Hut Limited and ZS the claimant would not be able to continue his employment. He did not use the word "victimised".

60. In respect of issue 3.16, the bringing of claim 1402946/2018 (being the claim against Zain Hut Limited) was a protected act within the meaning of the Equality Act 2010. It falls directly within s27(2)(a) Equality Act 2010.

61. Issue 3.17 is, accordingly, answered in the affirmative.

62. The present claim was not, in the end, presented to us on the basis of harassment. The actions of the 2nd respondent are properly characterised as victimisation within the meaning of section 27 Equality Act 2010.

63. In the circumstances the claim of victimisation against the 2nd respondent succeeds.

Remedy

64. Following the judgment given on liability, we dealt with remedy. Although we started to hear evidence on remedy it became clear that, in fact, the claimant had not given full disclosure of his documents in respect of loss of earnings. The claimant had obtained alternative employment with Waitrose but had not disclosed either his contract of employment with Waitrose or any wage slips. Moreover, the schedule in respect of loss of earnings which the claimant was now relying upon claimed significantly more than his previous schedule. The new schedule had only been disclosed on the morning of the hearing and did not set out with any particularity how the sums claimed had been calculated.

65. We took the view that it was unfair for the respondent to be forced to deal with the claim for loss of earnings in those circumstances. The respondent is clearly entitled to know the basis of the calculation which the claimant puts before the tribunal and also to be confident that proper disclosure has taken place.

66. We were also conscious, however, that the loss of earnings claim is not enormous and it would be regrettable if a further hearing was needed if one could be avoided. It is bound to increase costs and inconvenience for the parties if a further hearing is needed.

67. In those circumstances we took the view that we could deal with the claimant's claim in respect of injury to feelings and his claim for interest in the hope that, thereafter, the parties may be able to deal with the claim for loss of earnings by consent.

68. The respondent had the opportunity to cross-examine the claimant in respect of his claim for injury to feelings and we have noted what the claimant said in his statement.

69. The general principles in relation to the appropriate award for injury to feelings are set down in *Prison Service v Johnson* [1997] IRLR 162 and include that;

a. awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator.

b. Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches.

c. Awards should bear some broader general similarity to the range of awards in personal injury cases – not to any particular type of personal injury but the whole range of such awards.

d. Tribunals should take into account the value in everyday life of the sum they have in mind, by reference to purchasing power or by reference to earnings.

e. Tribunals should bear in mind the need for public respect for the level of awards made.

70. We have considered the bands of compensation set down by the Court of Appeal in *Vento v Chief Constable West Yorkshire* [2003] IRLR 102 and the updated awards set down in the 2nd addendum to *"Presidential Guidance: Employment Tribunal Awards for injury to Feelings and Psychiatric Injury Following De Souza v Vinci"*.

71. In respect of the lower band, awards of between £900-£8800 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In respect of the middle band, an award of £8800-£26,300 is appropriate for serious cases but those which do not merit an award in the highest band.

72. We considered the latest edition of the Judicial College Guidelines in respect of personal injury awards. We noted that in respect of post-traumatic stress disorder for a less severe case where a virtually full recovery would be made within one to 2 years and only minor symptoms would persist over any longer period an award of £3710-£7680 was appropriate. We also considered the guidance in respect of whiplash injuries and noted that in respect of injuries where a full recovery takes place within 3 months and a year the appropriate bracket is £2300-£4080 and where a full recovery takes place within a period of about 1 to 2 years an award of £4080 to £7410 is appropriate.

73. In determining the correct award in this case, we have taken into account that although, in some respects, the act of victimisation in this case was a one-off act, it did result in the claimant's employment being terminated. Moreover the context of that termination was that the claimant had been dismissed from a previous job, he said because of discrimination, and the dismissal in his role for the 1st respondent was because he had brought proceedings in respect of his previous job. That is bound to have caused him particular anxiety and stress. Although the claimant has now obtained alternative employment at a comparable salary, it took him some time to do so and there would have been upset and frustration as well as worry whilst he sought alternative employment and started that employment.

74. Taking account of all of the above guidance we take the view that the appropriate award is £7500.

75. In addition we consider that it is appropriate that the claimant should be awarded interest in this case, it has taken some time for the case to come to a hearing and, although we have not determined the question of loss of earnings yet, it is clear that the claimant was without the income which he would otherwise have had with the respondent. Those circumstances we take the view that it is appropriate to award interest in this case and the period over which the award is made is 64 weeks and one day. The rate of interest is 8% and on £7500 the appropriate amount of interest is, therefore, £739.73.

76. Thus there will be an award in relation to injury to feelings of £8239.73 inclusive of interest and question of loss of earnings will be adjourned in the hope that it can be resolved consensually between the parties. If it cannot be then it will be necessary for the parties to apply for a further hearing.

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Employment Judge Dawson

Date: 8th January 2020

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