Case Number: 3303949/2020 (V)

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Maurizio Adriano	**v**	Clientsinfocus Limited T/A Home Instead Senior Care

Heard: By CVP **On:** 15 March 2021

Before: Employment Judge M Warren

Appearances
For the Claimant: In person.
For the Respondent: Mr Harrington, Director.

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals.
This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers.

RESERVED JUDGMENT

1. The claimant's application to amend his claim to include a claim in breach of contract of wrongful dismissal is refused.

2. The claimant's claim for unlawful deduction from wages fails and is dismissed.

REASONS

Background

1. This case previously came before me on 3 February 2021. It was a final open hearing and I heard evidence on that occasion. That hearing, as with this, was conducted remotely by CVP. On the previous occasion, I did not have the tribunal file. During the hearing, a bundle of documents prepared

by Mr Adriano were emailed to me. I was pressed for time and adjourned to provide a Reserved Judgment.

2. On reviewing the file when it was provided to me, it became apparent to me that:

   2.1 Employment Judge Ord had identified the issues in the case to the parties as only, (1) alleged unlawful deduction of wages, (unlawful suspension) and (2) an alleged failure to allow Mr Adriano to be accompanied by his chosen representative at a disciplinary hearing. He stated that the remaining issues in the ET1 were outside the tribunal's jurisdiction.

   2.2 On 30 April 2020, Mr Adriano wrote to the tribunal to say that he had forgotten to indicate on his ET1 that his employment had not ended.

   2.3 On 9 September 2020, the respondent wrote to the tribunal to say that Mr Adriano was still employed.

   2.4 By an email dated 1 February 2021, not copied to the respondent, Mr Adriano made an application to amend his claim to include one of breach of contract following his wrongful dismissal without notice.

3. On the evidence I heard at the last hearing, it is clear that Mr Adriano was dismissed by letter dated 1 June 2020, (the claim was issued 2 months earlier, on 15 April 2020).

4. I must decide Mr Adriano's pleaded case. I am not bound by EJ Ord's identification of the issues. On 3 February, I identified the issues on the pleaded case as a claim of wrongful dismissal, because without the benefit of the additional information referred to above, that is expressly what it appeared to be; was the respondent entitled to dismiss Mr Adrian without notice because of his gross misconduct? The difficulty is of course, there was no basis for such a claim at the time, Mr Adriano had not been dismissed.

5. I can see that Mr Adriano did complain of being suspended without pay. I am unable to see where the reference is to a complaint that he was not permitted a companion of his choice. During today's hearing, Mr Adriano acknowledged that he had not at any time had a request for a particular companion refused, indeed no disciplinary or grievance hearing actually took place. He was similarly not sure where the notion that he had complained about being refused a companion of his choice had come from and confirmed that he did not pursue such a claim.

The Issues

6. The issues are therefore:

6.1 Should Mr Adriano be permitted to amend his claim to include a claim of breach of contract arising out of his dismissal on 1 June 2020?

6.2 If so, was he dismissed without notice in breach of contract, (which would entail a finding as to whether or not he was guilty of gross misconduct) and if so, what notice pay was he entitled to?

6.3 Was he suspended without pay in breach of contract and if so, what arears of pay is he entitled to?

Application to amend

The application

7. The application to amend the claim to include a claim that Mr Adriano was wrongfully dismissed on 1 June 2020 was made on 1 February 2021. It was not copied to the Respondent. It was made 8 months after dismissal, 5 months after expiry of the time within which the claim should have been made.

8. Mr Adriano says that he did not realise that there was a time limit. He made the application when he sent his documents for the hearing, (2 days before hand) and thought a Judge would consider the application before the hearing. He said he could not explain why he had not done it earlier, he thought that was the right time to do it. He confirmed that he had received advise from the CAB on this matter generally at about the time he was suspended and again in August 2020 after he was dismissed. The advice was from the same person both times. He is not sure if that person was an employment law specialist. He says that no mention was made of a three month time limit.

The law

9. When considering an application to amend, one must have regard to the guidance of Mummery J, (as he then was) in the case of Selkent Bus v Moore [1996] ICR 836. In exercising discretion, a Tribunal should take into account all the relevant circumstances and should balance the relative injustice and hardship of allowing or refusing the amendment.

10. Non-exhaustive examples of what might be relevant circumstances given by Mummery J included:

10.1 The nature of the amendment, whether it is a minor error, a new fact, a new allegation or a new claim;

10.2 The applicability of time limits and if the claim is out of time, whether time should be extended, and

10.3 The timing and manner of the application and in particular, why an application had not been made sooner.

11. There is no principle that prevents an amendment to an existing claim in respect of events that have occurred since the issue of proceedings. A tribunal should approach the question of whether or not to allow such an amendment applying the principles set out above, see Prakesh v Wolverhampton City Council UKEAT 0140/06.

12. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 in respect of breach of contract claims, Regulation 7, provides:

> *Subject to [articles 8A and 8B], an employment tribunal] shall not entertain a complaint in respect of an employee's contract claim unless it is presented—*
>
> *(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or*
>
> *(b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated,*
>
> *(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.*

13. The question of whether it was reasonably practicable to bring a claim in time is a question of fact for the Tribunal. The onus is on the Claimant to show that it was not reasonably practicable, (Porter v Bandridge Ltd [1978] ICR 943 CA).

14. The expression, "reasonably practicable" has been held to mean, "reasonably feasible". See Palmer v Southend Borough Council 1984 IRLR 119 CA.

15. In Marks and Spencer v Williams-Ryan 2005 IRLR 565 the Court of Appeal held that regard should be had to what, if anything, the employee knew about the right to complain and of the time limit. Ignorance of either does not necessarily render it not, "reasonably practicable" to issue a claim in time. One should also ask what the claimant ought to have known if he or she had acted reasonably in the circumstances.

16. Ignorance of the law is of itself, no excuse for failure to comply with the time limit. The question is whether the ignorance was reasonable? A claimant should make reasonable enquiries about his rights.

17. If a claimant is using a professional advisor, then generally speaking, the claim should be brought in time. The primary authority for that is Dedman v British Building and Engineering Appliances Limited [1974] ICR 53. What Lord Denning said in that case, is:

> *"If a man engages skilled advisors to act for him and they mistake the time limit and present it too late, he is out. His remedy is against*

them."

18. In the case of Northamptonshire County Council v Mr Entwhistle UKEAT 0540/09/ZT, the then President of the EAT, Mr Justice Underhill, reviewed the case of Dedman and some subsequent authorities which may have been thought to bring its *ratio* into question. He confirmed that the principle of Dedman is still very much good law, but with the caveat that one must bear in mind the question is, was it reasonably practicable to bring the claim in time? We are reminded that it is possible to conceive of circumstances where a skilled advisor may have given incorrect advice, but nevertheless it was not reasonably practicable for the claim to have been brought in time.

19. Where advice from the CAB is concerned, taking together Riley v Tesco Stores Ltd [1980] ICR 323CA, RBS v Theobald UKEAT/0444/06, Ashcroft v Haberdashers' Aske's Boys' School [2008] ICR 613 and Remploy Ltd v Brain UKEAT/0465/16 the fact that the claimant may have had advice from a CAB advisor is relevant to the overall consideration of whether it was reasonably practicable to bring the claim in time.

Discussion and conclusions

20. Although wrongful dismissal was mentioned in the original claim, it is not possible to make a claim for something that has not yet happened. After he was dismissed, Mr Adriano should have issued a new claim for wrongful dismissal or applied to amend. Unlike the test applied in cases of discrimination, where one can ask oneself whether it is, "just and equitable" to extend time the, "reasonably practicable" test gives far less latitude. Mr Adriano is an articulate, intelligent person with reasonable IT skills. He has taken advice. He is capable of conducting his own research. I find that it was reasonably practicable for a separate claim of wrongful dismissal or for the application to amend, to have been made in time. The application to amend is therefore refused.

The facts on the extant claim

21. These are my findings of fact on the extant claim, namely for pay during the so called period of suspension.

22. References to page numbers are the electronic page number of a document in the respondent's bundle, unless stated otherwise.

23. Mr Adriano's employment with the respondent as a care giver began on 26 November 2019. A copy of his contract, signed by him, appears in the respondent's bundle at pages 1-7. It expressly states that his status is that of employee, not worker, and that, *"employment contractual obligations apply".*

24. The second page of the contract sets out the following:

"**Hours of Work**

Your employment is conditional upon your agreement to work flexible hours within your availability and your hours of work are conditional upon the requirement of the company.

Your availability is confirmed as: …

You must ensure that you are available during the hours that you have agreed during your employment process as this forms the basis of your employment contract. During availability, you will commit your time, attention and abilities to those duties allocated to you.

The company will allocate clients within your availability on the understanding that you will be available to work, except when you are exercising your right to take holiday in line with your terms of employment. The company will endeavour to provide you with as much notice as is possible of any hours that you are required to work.

The company cannot provide a guarantee of hours as these are driven by client demand and therefore the company has no duty to provide you with payment in respect of such times."

25. At page 5 there are clauses relating to notice of termination of employment which read as follows:

> "The notice to be given by both parties is one month during the first year on joining the company and two months after one year of service. However, by mutual agreement, any period of notice may be waived. During the unexpired period of notice (on either side) the company may suspend you from your duties and direct that you absent yourself from the company's premises and clients on garden leave to maintain continuity of service and confidentiality for clients.
>
> In the event of gross misconduct your employment will be terminated immediately."

26. There is no other reference to an entitlement to suspend, other than in the context of the notice period referred to above.

27. On 7 January 2020, Mr Harrington wrote by email to Mr Adriano (page 15). He made reference to the family of a client I will refer to as JR to the effect that Mr Adriano had made comments about the client's catheter. He also said that it had been suggested to him that Mr Adriano was commenting to another client I will refer to as KH, that the district nurses were not completing their tasks correctly.

28. On 10 January 2020, Mr Harrington received an email from a colleague of Mr Adriano's, (page 17) suggested that there were concerns about whether or not he was spending the amount of time with a particular client

that he was supposed to and whether or not inaccurately recording his time with the client.

29. On 5 February 2020, Mr Harrington wrote to Mr Adriano by email as follows:

> " …I have also been made aware of concerns with your conduct and performance over the last few days which I will be fully investigating.
>
> I have removed all of your calls for tomorrow.
>
> I will contact you again when my investigations have been concluded which may result in a disciplinary for gross misconduct"

He was provided with not more work and received no more pay until the termination of his employment.

30. On 24 February 2020 Mr Harrington wrote to Mr Adriano inviting him to attend a disciplinary hearing on 27 February at 1400 hours.

31. In fact, Mr Adriano turned up for the meeting at 2 o'clock and nobody arrived. He says he left after a period of time. The respondent says that it emailed him to inform him that the time had changed to 3.30 that afternoon, Mr Adriano says he did not receive such an email.

32. Difficulties caused by the coronavirus crisis and national lock down ensued, causing delays on the part of Mr Harrington.

33. Nothing further happened until Mr Adriano issued these proceedings on 15 April 2020. Subsequently on 5 May, (page 39) Mr Harrington wrote to Mr Adriano apologising for the delay, due to the Coronavirus, making reference to Mr Adriano's grievance of 25 February 2020 and inviting him to a meeting on 20 May 2020. That was subsequently re-arranged for the 1 June.

34. Mr Adriano did not attend the meeting on 1 June 2020. Mr Harrington then wrote to Mr Adriano on 1 June, (page 45) informing him that he was dismissed without notice, his last day of service would be 1 June 2020 and the reasons for dismissal were given as:

> "• Falsely completing paperwork and leaving a client's early without permission.
> • Professional conduct.
> • Safeguarding breaches."

Conclusions

35. Whilst under the terms of the contract, Mr Adriano was obliged to accept work if offered, the respondent was not obliged to offer work. This was the way the contract operated in practice. If there was no work available, if clients did not want a particular carer to visit them, no work was offered. I

do not need to concern myself with the question of whether that rendered Mr Adriano a worker rather than an employee.

36. Whilst the contract does not refer to suspension from normal duties, the respondent was entitled to choose not to offer Mr Adriano work whilst it investigated the issues which had arisen about his conduct and it was not obliged to pay him.

37. I should make it absolutely crystal clear, I make no finding as to whether or not the respondent's concerns about Mr Adriano's conduct were well founded.

38. Mr Adriano's claim for unpaid wages fails.

Employment Judge M Warren

Date: 16 March 2021
6 April 2021
Sent to the parties on: .....

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For the Tribunal Office