EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr V Gyurov	**v**	Dial A Carer Group Limited

On: 24 May 2021

Before: Employment Judge M Warren

JUDGMENT

1. The claimant's claims that he was unfairly dismissed for having made a protected disclosure succeeds; the respondent shall pay the claimant compensation by way of a Basic Award in the sum of £610.67.

2. The claimant's claim that he was subjected to detriment for having made a protected disclosure succeeds; no award for compensation is made in this regard.

3. The claimant's claim in breach of contract for notice pay succeeds; the respondent shall pay the claimant damages in the sum of £384.61.

4. The claimant's claim for unpaid holiday pay succeeds; the respondent shall pay the claimant compensation in the sum of £1,384.59.

5. For the avoidance of doubt the total payable under the terms of this Judgment is £2,379.87, to be paid without deduction.

REASONS

Background

1. I find myself in an unusual and unsatisfactory situation this morning.

2. Mr Gyurov was employed by the respondent as a community manager between 1 April 2018 and 27 June 2019. After early conciliation between 21 August and 21 September 2019, he issued these proceedings on 10 October 2019.

3. The factual framework of the claims are that the respondent's business was the provision of care to service users in their home. Mr Gyurov says that he made a disclosure to the Care Quality Commission on 21 June 2019 which was a protected disclosure and as a result of which he was subjected to detriment on 25 June 2019 by being removed from on-call duties and subsequently dismissed on 27 June 2019. He further claimed in his claim form one weeks' notice pay and 18 days holiday pay.

4. The claims were resisted by detailed grounds of resistance in which the respondent denied knowledge of the report to the CQC and stated that the removal from on-call duties and subsequent dismissal was by reason of Mr Gyurov's misconduct in missing visits and failing to arrange for cover.

5. During the course of these proceedings, on 13 February 2020, the respondent went into voluntary liquidation.

6. On 6 March 2020, the respondent's legal representative came off the record, writing to the Tribunal that they were no longer acting for the respondent.

7. On 20 May 2021, the liquidators wrote by email to the claimant's representative to state that they intended to take no part in the hearing of this matter.

8. This case was scheduled for a 3 day hearing starting today.

9. The respondent has taken no part in preparing the case for hearing; there has been no disclosure from the respondent and no witness statements have been provided.

10. Today is Monday 24 May 2021. On Friday 21 May 2021 at 10:45, the claimant's solicitors made application for either Judgment in default or in the alternative, for the case to be dealt with on the papers without the claimant, his witnesses or his legal representative having to attend.

11. I am informed that Employment Judge Lewis directed that the case should be decided on the papers.

Papers before me today

12. As this case was scheduled for a CVP hearing and was to be conducted remotely, I do not have the Tribunal file.

13. All that I have before me are documents which Mr Raffell, acting for the claimant, provided with his email of 21 May 2021 as follows:

    13.1 ET1.

    13.2 Particulars of Claim.

    13.3 ET3 and Grounds of Resistance.

13.4 Printout from Companies House confirming winding up of respondent.

13.5 Email from respondent's representatives, the AP Partnership, to the Tribunal 6 March 2020.

13.6 Email from a Ms N Southwell of liquidators Bretts Business Recovery dated 20 May 2021.

13.7 Letter claimant's representative to respondent dated 6 August 2019.

13.8 Letter claimant's representative to respondent dated 19 July 2019.

13.9 Witness statement of the claimant bearing an electronic signature and dated 10 January 2020.

13.10 Witness statement of a Ms Lisa McPherson in draft, on behalf of the claimant.

13.11 Witness statement of a Alina Vulpe on behalf of the claimant, unsigned dated 21 August 2019.

13.12 List of factual and legal issues.

13.13 Schedule of Loss.

13.14 Copy of Early Conciliation Certificate.

Application for default Judgment

14. The application for default Judgment pursuant to rule 21 is odd. Rule 21 applies where no response has been presented, or the response has been rejected, or where the respondent has stated the claim is not contested. None of those apply in this case.

15. There is no such thing as a, "default Judgment" in the Employment Tribunal anyway. Rule 21(2) simply provides that an Employment Judge shall decide whether on the available material a determination can properly be made, which is not the same as the issue of an automatic Judgment in default.

Consideration of the claims on the papers

16. Had I been presented with Mr Raffell's email of 21 May 2021, my direction would have been to refuse the application and to indicate that the claimant and his representatives should attend for the outset of the hearing. Such a hearing might not be expected to last very long, but at least the employment judge dealing with the matter would have the opportunity of taking evidence under oath, seeking answers to any queries which may arise, including rectifying any oversight in the provision of information an employment judge might need to decide the outcome of the case.

17. That said, EJ Lewis has directed that the case shall be dealt with on the papers and having regard to the case of Serco Ltd v Wells [2016] ICR 768, that is how I must deal with the matter.

18. I must decide the pleaded claims based upon the evidence before me. The burden of proof is the balance of probabilities.

19. A robust and detailed defence has been filed; I cannot decide the case simply on the basis of what the claimant has set out in his claim form. Fortunately, Mr Gyurov's witness statement is signed, (albeit electronically) and bears a statement of truth. The other two statements are unsigned and therefore of little use to me.

Protected disclosure

20. The protected disclosure relied upon is a statement to the CQC which Mr Gyurov says he made on 21 June 2019, with regard to health and safety concerns and about client's being left without care. Notably, the respondent does not expressly deny that any such disclosure was made, it simply says that it was not aware of such disclosure.

21. Mr Gyurov has stated in his witness statement at paragraph 17 that he made such a disclosure and I therefore find that he did so.

Detriment

22. Was Mr Gyurov subjected to a detriment for having made that disclosure? The detriment relied upon is that on 25 June he was removed from on-call duties.

23. Section 48(2) of the Employment Rights Act 1996 provides that it is for the employer to show the ground on which any act was done. Thus, if the claimant shows that he was subjected to a detriment, it is for the respondent to show why.

24. At paragraph 26 of the Grounds of Resistance, the respondent accepts that the claimant was removed from on-call duties. It therefore falls to the respondent to satisfy the burden of proof by showing the reason. The respondent has produced no evidence.

25. I therefore find that Mr Gyurov was subjected to detriment for having made the protected disclosure, by being removed from on-call duties.

Unfair Dismissal

26. In a case of automatic unfair dismissal, where a claimant does not have the 2 years' service that would otherwise enable him to claim ordinary unfair dismissal contrary to section 98(4) of the Employment Rights Act 1996, the claimant will bear the burden of proving on the balance of probabilities that the reason for dismissal was the automatically unfair

reason, see Smith v Hayle Town Council [1978] ICR 996 CA. It is noted in Kuzel v Roche Products Ltd [2008] IRLR 530 that it will be rare for there to be direct evidence of an employer dismissing an employee because of a disclosure and tribunal's may therefore draw inferences from findings of primary fact as to the real reason for the dismissal.

27. In this case, it is not disputed that no formal procedure was followed in the dismissal of Mr Gyurov, other than that he was called into a meeting at which he was informed that he was dismissed. There was no investigation, no advance notice of the disciplinary hearing or of the potential outcome, no notice of a right to representation, no notice of a right of appeal. Having regard to the absence of any fair process and the remarkable co-incidence in timing, the disclosure on the 21 June and dismissal on the 27 June, and given the absence of evidence from the respondent, I infer that the reason for dismissal was that Mr Gyurov had made the disclosure to the CQC. Mr Gyurov's dismissal was therefore automatically unfair and his claim for unfair dismissal succeeds.

Notice Pay

28. Mr Gyurov claims one weeks' notice pay.

29. In paragraph 33 of the Grounds of Resistance, the respondent states he was paid the equivalent of one weeks' notice pay in lieu.

30. In his witness statement at paragraph 27, Mr Gyurov states that he was owed one weeks' notice pay. On the basis of that unopposed evidence, his claim in breach of contract for one weeks' notice pay succeeds.

Holiday Pay

31. Mr Gyurov claimed in his ET1 18 days holiday pay.

32. At paragraph 33 of the Grounds of Resistance, the respondent denies that he was owed holiday pay.

33. At paragraph 27 of his witness statement, Mr Gyurov gives evidence that he was owed 18 days holiday pay and on the basis of that unopposed evidence, I find that he was owed such holiday pay and his claim for holiday pay succeeds.

Un-pleaded claims

34. The List of Issues makes reference to unpaid travel time and unpaid wages. These do not appear to be pleaded and I note, do not appear in the Schedule of Loss. As un-pleaded claims, I have not considered them.

35. I notice that the Schedule of Loss makes reference to training costs of £307.60 deducted. This is not pleaded either and I have not therefore considered it.

Remedy

36. I refer to the Schedule of Loss and treat that as the document setting out the compensation which Mr Gyurov seeks in respect of his claims. Holiday Pay claim is valued at £1,384.59 and the Notice Pay claim at £384.61. I award those sums as claimed.

37. I note that there is no claim for injury to feelings in respect of the detriment, nor for any financial loss arising out of the detriment. I therefore make no award in that regard.

38. I note in respect of the Basic Award, the amount claimed appears to be calculated correctly in the sum of £488.54. The applicable ACAS Code of Practice relating to Disciplinary and Grievance Procedures 2015 applies and was not followed. Pursuant therefore to s.207A of the Trade Union & Labour Relations (Consolidation) Act 1992 I find that it is just and equitable to increase the award for the Basic Award by 25%. The amount of the Basic Award shall therefore be £610.67.

39. In respect of the compensatory award, I note in the first place loss is claimed to 2 June 2020 only. I have not been provided with any evidence at all in the witness statement about Mr Gyurov's financial losses resulting from the dismissal. I have no information with regard to whether or not he has received state benefits and therefore whether the recoupment provision applies. In those circumstances, I make no compensatory award. Given that the respondent is in liquidation, this would presumably be of little consequence to Mr Gyurov.

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Employment Judge M Warren

Date: 7 June 2021

Sent to the parties on: 18 June 21

For the Tribunal Office