EMPLOYMENT TRIBUNALS

Claimant: Mr M Reese

Respondent: Westgrove Support Services Limited

Heard at: Watford (CVP) **On:** 7 & 8 June 2021

Before: Employment Judge S Moore

Appearances
For the Claimant: In person
For the Respondent: Mr J Jenkins, counsel

This has been a remote hearing on the papers to which the parties/consented did not object. The form of remote hearing was CVP. A face-to-face hearing was not held because it was not practicable and all matters could be determined in a remote hearing.

JUDGMENT

(1) The claim of automatic unfair dismissal contrary to s. 103A of the Employment Rights Act 1996 is dismissed.

(2) The claim of breach of contract for unpaid notice pay is allowed in the sum of £85.00 (gross)/ £70.83 (net).

(3) The claim of failure to provide particulars of employment under s. 38 of the Employment Act 2002 is allowed in the sum of £425.00.

REASONS

Introduction

1. This was claim of automatic unfair dismissal on grounds of making a protected disclosure pursuant to s.103A of the Employment Rights Act 1996 (ERA), a claim for unpaid notice pay, and compensation for failure to provide

employment particulars pursuant to s. 38 of the Employment Rights Act 2002. I heard evidence from the Claimant and from Mr Callum Grant (CG), and for the Respondent from Mr James King (JK), Cleaning Manager and I was referred to bundle of documents comprising approximately 350 pages.

Facts

2. The Respondent is a cleaning and security services provider and at the relevant time provided those services to The Lexicon, a shopping centre and mall in Bracknell. The Claimant first began working for the Respondent at The Lexicon on 10 September 2018 as a temporary cleaner through an agency and became a full-time employee of the Respondent on 1 April 2019. He was dismissed on 22 October 2019 by which point in time the Respondent had commenced a redundancy process, although it is common ground the Claimant was not dismissed on grounds of redundancy.

3. Since the issues had not previously been identified at a Preliminary Hearing, I identified them at the outset of the hearing as follows:

<u>Automatic Unfair Dismissal</u>

(1) Did the Claimant's letter of 7 October 2019 to JK amount to a protected disclosure for the purposes of s. 43B ERA. That is to say:
   (a) Did it disclose information?
   (b) If so, did the Claimant reasonably believe that information tended to show:
      (i) The Respondent was failing to comply with a legal obligation in relation to the redundancy process and/or
      (ii) The health or safety of any individual had been, was being, or was likely to be endangered; and
   (c) Was the disclosure made in the public interest?

(2) If so, can the Claimant show that the reason or principal reason for his dismissal was because he made that disclosure?

<u>Notice Pay</u>

(3) Was the Claimant paid the correct amount of notice pay?

<u>Employment Particulars</u>

(4) When was the Claimant provided with particulars of employment and is he entitled compensation for any failure to provide them pursuant to s.38 of the Employment Act 2002?

4. It was agreed at the outset of the Claimant's employment, at the Claimant's request, that he would only work late shifts, which were shifts of 10 hours from 12 noon to 10pm or from 10am to 8pm, and that he would have a fixed amount of overtime of 10hrs per week.

5. Paragraph 1.2 of the Claimant's contract of employment provided that the first six months of his employment was a probationary period and that his employment could be terminated during this period on one week's notice.

Further, that the Respondent could extend the probationary period for up to a further three months. The Respondent says that the Claimant was sent a copy of his contract in April 2019, the Claimant disputes this (see further below). In any event it is common ground that the Claimant was sent (at this request) a copy of his contract on 10 September 2019, and it is further common ground that the Claimant was aware that the first six months of his employment was a probationary period and that that period could be extended.

6. As regards holidays, the contract states at paragraph 7.2 that "You shall give at least 28 days' notice of any proposed holiday dates and these must be agreed by your manager in writing in advance."

7. JK gave evidence, which I accept, that although both individual employment contracts and the Respondent's policy required 28 days' notice of holiday, he tried to be flexible and would allow holidays to be taken at shorter notice where consistent with operational need. He also stated, and I accept, that since he had to account to the client on a weekly basis for any shortfall in contracted hours of service, he generally required employees to have a good reason for taking holiday at short notice.

8. Initially there was no problems with the Claimant's work. A quarterly performance review dated 27 April 2019 shows the Claimant meeting or exceeding all expectations. There are also a number of Holiday Request Forms in the bundle in respect of the Claimant signed by his supervisor Mr Chris Goodall (CG); one form requests 4 days' holiday with less than 28 days' notice, three request holiday with more than 28 days' notice. The Claimant took issue with the fact that CG had signed these forms on the basis that CG was a supervisor and not a manager. It is unclear where this point was intended to lead. In any event, since CG clearly had delegated authority to authorize the Claimant's holiday and was the person to whom the Claimant reported under paragraph 2.1 of his contract, there was nothing about the Claimant's grant of holiday that was inconsistent with the Respondent's holiday policy.

9. On 28 September 2019 the Claimant asked CG if he could take holiday on 18 and 19 October 2019 (a Friday and Saturday). CG refused the request because the Claimant had given less than 28 days' notice, the days he had requested were very busy from a retail perspective, and he considered there was insufficient cover in the rota to allow the Claimant to be away. The matter was referred to JK, who, on 30 September 2019, also refused the Claimant's holiday request.

10. On 1 October 2019 there was a meeting between JK, CG and the Claimant. JK asked the Claimant why he wanted to take holiday and the Claimant replied it was none of his business. In this respect the Claimant says that JK actually asked him, 'What's your story?", and the Claimant replied, 'Why do I need a story?' JK agreed he may have said this, but as part of a longer conversation in which he was trying to understand the reason why the Claimant wanted to take holiday. In any event, whatever, precisely, may have been said, the Claimant agreed in cross-examination that he understood that by asking, 'What's your story?" JK was asking him why he wanted to take the holiday, and he chose not to give JK a reason - either because he objected to the precise form of the

question or for some other reason. The Claimant then told JK that he would not be coming in on the days in question anyway. Indeed, the Claimant says he made it very clear he would not come in on those days, that this was recorded in the notes of the meeting, and that by signing the notes of that meeting JK effectively agreed to allow him to take the days as holiday. Unfortunately the notes of the meeting are missing. However JK agrees that notes were probably taken at the meeting, and that he and the Claimant would have signed them to indicate they were accurate, but not as a means of authorizing the Claimant's holiday.

11. I accept JK's interpretation of events. Signing the notes of the meeting to agree that they accurately recorded what had been said did not indicate that JK was thereby agreeing to the Claimant's holiday request, and the Claimant could not reasonably have thought that JK was so agreeing. I accept JK made it clear at the meeting that the Claimant did not have permission to take off 18 & 19 October 2019 and that he could face disciplinary action if he did not attend work on those days.

12. It is also agreed that at that meeting JK told the Claimant his probationary period was being extended because of the Claimant's bad attitude in relation to taking holiday. The Claimant states that he told JK that he had already completed his probation because it had finished on 30 September 2019 (the day before). JK disputes this. There is also some confusion as to whether or not JK involved the HR department in the extension of the Claimant's probationary period. However this dispute of evidence is not relevant. First, because it is clear from subsequent emails that JK genuinely thought the Claimant's probationary period had been extended, and that the Claimant was still on probation at the time of his dismissal, and secondly, because whether or not the Claimant was still on probation or not at the time of his dismissal did not affect his employment rights or his notice period.

13. On 3 October 2019 rumours began to circulate of a redundancy process

14. On 4 October 2019 JK met with all staff, including the Claimant, to explain there would be cuts to the cleaning team and that a new rota would be in operation from 1st November 2019 with reduced hours. Staff were invited to apply for one of the positions, or they could opt to take voluntary redundancy, and were asked to respond by 7 October 2019. The number of positions available was being reduced from approximately 30 to 18. External candidates were also allowed to apply for positions as well.

15. 7 October 2019 the Claimant wrote a letter to JK saying he could not respond as requested because he did not believe the redundancy or the redundancy process had been handled correctly. In evidence he said the letter reflected his concern about two things: the redundancy process and health and safety.

16. As regards the redundancy process, the letter stated that the redundancy process should be classed as a mass redundancy and that there should have been group consultation, allowing union representation.

17. The Claimant also stated that he did not believe the correct amount of notice had been given and that a minimum of one month's notice should have been given with longer serving employees receiving one week's notice per year serviced.

18. The Claimant also made other complaints about alternative options not being given, job shares or part-time work not being offered, new job descriptions not being issued and a four-week trial period not being mentioned. Employees had also not been offered advice or time-off to look for other employment.

19. In the penultimate paragraph of the letter the Claimant stated:

    "The new rota also raises concerns regarding Health and Safety, as mentioned in the consultation new employees have been selected to fill up the new rota if the current employees are not successful in applying for their current positions, will the new employees be trained before the start of the new rota? We currently work at height with no additional training and empty units without specific manual handling. As there will not be enough staff on site for a fire evacuation, and some current employees are simply not capable of fire evacuation, this will pose a significant risk to the public and tenants."

20. On the same date JK forwarded the letter to Jenny White (JW), a Business Manager, stating the Claimant was completely incorrect that 20 staff would be made redundant, that no notice had yet been given to anyone, that consultation had taken place for each shift, that union representation was allowed, that staff had been permitted to put forward their own version of the rota and that the rest was "emotional clap trap." He further said that the Claimant "is still on his probation period and will not likely make it through the process due to his attitude".

21. On 9 October 2019 JW sent an email to the Respondent's HR Department and on 14 October 2019 HR replied to JW and JK stating that someone should speak to the Claimant and explain that it was not a mass redundancy because less than twenty people were to be made redundant, that there was no stipulated notice except for each individual's entitlement to notice pay, and that anything else he had queried did not need to be addressed as he was still on probation.

22. On 15 October JK replied to HR stating:

    "Matt is not in until tomorrow so I will see him then. It is likely that come Friday (if he continues to carry out his threat) that he will fall foul of his probationary period anyway. Matt put in a holiday request which was declined 21 days' notice only, and not enough cover on the rota for it to be granted. Matt has stated that he doesn't care what we say and that he won't be in on 18/19 September anyway. He was asked if the leave was for a special reason but he told us it was none of our busines what he did on holiday. Which is fair enough but doesn't give us any room for special consideration to be taken into account. If he does not come in Friday/Saturday then I will terminate his employment on the grounds of a failed probation period. Are you OK with this?'

23. HR replied, 'Yep that's fine if he takes the holiday anyway then fail his probation."

24. The Claimant did not attend work on either 18 or 19 October 2019.

25. On 22 October 2019, the Claimant was called to a meeting with JK and JW. At that meeting the Claimant was told he was being dismissed on 1 week's notice. The form completed either shortly before or at that meeting by JK is headed "Probationary Review Form" and indicated that the Claimant "took time off unauthorised" was not flexible because "no o/t, nor earlies" and "thrives on conflict". The Manager's comments state "Took time off when holiday application was declined." The Claimant's comments state that he was "Fired due to Redundancy". In evidence he said that JK had told him that one of the reasons he was being fired was because he was the only member of staff to have made a complaint about the redundancy process.

26. I don't accept the Claimant's evidence in this latter respect. Notably on 23 October 2019 JK wrote the following email to HR:

> "As threatened, Matt failed to turn up for his shifts on Fri and Sat last week. I spoke with Matt on Monday with Jenny and failed his probationary period giving him 1 week's notice…
> As I thought Matt is trying to drag the process somewhere, not sure where. He is stating that he has been dismissed due to the fact he called foul on the redundancy process. I stated VERY clearly that the failure of his probationary period is down to 1 factor which is disobeying a clear management instruction in not allowing him his holiday but taking it anyway. I further stated that going forward we need staff who can be relied upon and follow the procedure for time off. However, he kept bringing it back to the redundancy procedure and that is why he is being fired."

Conclusions

(1) <u>Automatic unfair dismissal</u>

27. The first issue is whether the Claimant's letter of 7 October 2019 amounted to a protected disclosure.

28. In order for a statement to be a qualifying disclosure it has to have sufficient factual content and specificity that it is capable of showing malpractice of the kind set out in subparagraph 43B(1) ERA. Further, although it is not necessary for a claimant to show his assertions were correct, his belief in the alleged malpractice must be a reasonable one.

29. As regards the redundancy process, the Claimant made a number of allegations directed first to an assumption that the redundancy was a mass redundancy and secondly to matters of good practice and/or fairness in a redundancy procedure.

30. In this case the Claimant's belief that the redundancy process was a mass redundancy was not a reasonable one. The fact that a pool of twenty or more employees was put at risk of redundancy did not mean that the Respondent was proposing to make twenty or more employees redundant; it was not proposing to do so and the Claimant's insistence otherwise was pure assumption without any investigation of the correct factual or legal position.

31. As regards the general assertions of alternative options not being given, job shares or part-time work not being offered, new job descriptions not being issued, a four-week trial period not being mentioned or employees not being offered advice or time-off to look for other employment, these amounted to a list of assumptions that, at a later stage in the redundancy process, the Respondent might fail to take certain measures potentially relevant to the fairness of a redundancy dismssal. First, in my judgment, the allegations were too unspecific to constitute a disclosure of information, secondly they were directed to a potential failure to comply with guidance/good practice, rather than actual legal obligations, and thirdly, at that point in time the Claimant had no basis for a reasonable belief that the Respondent would in fact fail to comply with relevant guidance/good practice as the redundancy process progressed.

32. Turning to the penultimate paragraph of the Claimant's letter. The first sentence is a question, not a disclosure of information. The second sentence states "We currently work at height with no additional training and empty units without specific manual handling.' This assertion does not appear to be related to the redundancy process at all and is devoid of sufficient factual content to constitute a disclosure of information. That lack of specificity was illustrated by the fact that it became apparent in evidence that by working at height the Claimant had mind having to clean on top of car parks and roofs, which JK was adamant did not constitute working at height for the purposes of health and safety requirements because all such roofs are required to have a safety parapet. As regards the final sentence of the Claimant's letter, the Claimant appeared to be asserting that a reduction in cleaning staff would mean insufficient staff would be on site for the purposes of conducting a fire evacuation. JK gave evidence, which I accept, that cleaning operatives were not responsible for fire evacuation. The Respondent employed full time security controllers and security officers who were on site 24/7 and responsible for fire evacuation – and whose numbers were not affected by the redundancy procedure. In this respect I do not accept that the Claimant could reasonably have believed that the proposed reduction of cleaning staff was likely to endanger the public or tenants because it would negatively impact fire evacuation procedures.

33. For these reasons I do not consider the Claimant's letter of 7 October 2019 constituted a protected disclosure for the purposes of section 43B ERA. However, in any event, even if I am wrong about that, I am not satisfied that the letter was the reason, or the principal reason, for the Claimant's dismissal.

34. The Claimant requested time off on 18/19 October 2019, which was refused. He chose not to give his managers any reason why he wanted the time off and told them he intended to take the time off anyway. In my judgment, in these circumstances, the reference in JK's email to JW on 7 October 2019 to the fact

that the Claimant "is still on his probation period and will not likely make it through the process due to his attitude," is, more likely than not, a reference to the Claimant's attitude in stating he intended to take 2 days holiday despite permission to do so having been refused. Furthermore, that that was indeed the reason for the Claimant's dismissal is borne out by the content of the emails between JK and HR at the time, the content of the Probationary Review Form at the dismissal meeting on 22 October 2019, and the timing of the Claimant's dismissal, namely immediately after he had carried out his threat not to come in on the days in question.

35. The Claimant submits that JK signed the notes of the meeting on 1 October 2019, thus agreeing to his holiday, and that the two days holiday was not mentioned again until after he had put in his letter of complaint on 7 October 2019. As stated above, the fact that JK signed the notes of the meeting did not imply that he was authorizing the Claimant's holiday. I have found that he refused the Claimant holiday and the Claimant could not reasonably have been in any doubt about that after the meeting of 1 October 2019. I further accept that the reason why JK did not raise the matter with the Claimant again until after 18/19 October 2019, was because, having made his position clear, he was waiting to see whether or not the Claimant would carry out his threat of not coming in. When the Claimant did not come in, JK immediately chose to dismiss him. Since the Claimant had directly disobeyed a management instruction, and adopted an evidently confrontational manner, that decision was hardly a surprising one.

36. Accordingly, in the light of the above, the claim for automatic unfair dismissal is dismissed.

37. As regards the claim for notice pay, the Respondent has accepted that it miscalculated the Claimant's notice period, and that the Claimant is owed one day's pay, which is a gross sum of £85 and a net sum of £70.83.

38. The Claimant has also made a complaint under section 38 Employment Act 2002 for failure to be provided with employment particulars. The Claimant says that he did not receive employment particulars when he became an employee in April 2019 and had to request them in September 2019 (when, in fact, he was initially sent the wrong contract for a security guard instead of a cleaning operative). The Respondent states that the employment particulars were sent to the Claimant in April 2019 and that he must, for some reason, have not received or mislaid them. In view of the fact that some documents appear to be missing from the bundle, and also the errors made by the HR department as regards initially sending the Claimant the wrong contract in September 2019 and the miscalculation of his notice pay, I accept, on the balance of probabilities, that the error in this respect lies with the Respondent rather than the Claimant, and that he wasn't sent his employment particulars until September 2019.

39. It follows that under s. 38 of the Employment Act 2002 the Claimant is entitled to a minimum of 2 weeks' pay and a maximum of 4 weeks' pay. Since the Respondent's failing was one of oversight and the Claimant was sent his contract when requested, I find the Claimant is entitled to 2 weeks' pay.

40. It is agreed the Claimant worked 50 hrs per week at a rate of £8.50 per hour. Therefore he is entitled to £425.00 compensation under this head of claim.

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Employment Judge S Moore

Date: 8 June 21

Sent to the parties on:

6 July 21

For the Tribunal: