SOB/rm

EMPLOYMENT TRIBUNALS

Claimant: **Ms A Adolphi**

Respondents: **(1) Boleyn Road Practice (a partnership)**
(2) Mr M Rafiq
(3) Dr S Rafiq

Heard at: **East London Hearing Centre** **On: 13 July 2021**

Before: **Employment Judge O'Brien (sitting alone)**

Representation

Claimant: **In person**

Respondent: **Mr M Rafiq**

JUDGMENT having been sent to the parties on 19 July 2021 and reasons having been requested in accordance with Rule 62(2) of the Rules of Procedure 2013.

REASONS

1. In an ET1 presented on 15 June 2020 the claimant complained of unfair dismissal, wrongful dismissal, unauthorised deductions from wages and unpaid holiday pay. In the original response, drafted by solicitors, the second respondent resisted the claim and asserted amongst other things that the claimant's employment had transferred to a successor practice, and asked that that practice be added as a respondent (amongst others). However, the second respondent subsequently disavowed that response, asked that no other respondents be added and asked for the matter to be stayed.

2. The basis of the application to stay was the second respondent's assertion that the Boleyn Road Practice had been forced to close because of the unlawful withholding of funds by the NHS, that he was attempting to resolve that issue and that to allow the claim to proceed would be a tacit acceptance on his part that the withholding of funds had been lawful. However, no formal action had commenced regarding this dispute despite some time having now passed nor was I persuaded that requiring the respondents to answer the claimant's case would call any prejudice. The claimant, on the other hand, was entitled to have her case heard without delay, and would suffer clear prejudice if the matter were stayed. Therefore, I refused the respondent's application.

3. The claimant's claim was set out in detail in a document attached to her ET1 claim form, and made clear that she had been employed by Boleyn Road Practice. As made clear in the original response, Boleyn Road Practice is a partnership between Mr M Rafiq and his

wife, Dr S Rafiq. Notwithstanding Mr Rafiq's objections, I considered it necessary in the interests of justice to amend the claim so that the partnership was named as respondent as well as the individual partners, rather than Mr Rafiq alone. Given that the relationship between the respondents, I waived service of the case documentation on the first and third respondents.

Findings of Fact

4. The claimant was born on 3 July 1982. She was employed by the respondents as a senior administrator on 7 April 2017 and remained employed in that capacity until 25 September 2020.

5. The respondent partnership is a GP practice, the partners being Dr S Rafiq (the third respondent) and Mr M Rafiq, her husband (the second respondent).

6. The claimant entered into a contract of employment with the practice, the relevant provisions of which were as follows:

6.1 She would work 24 hour per week over four days.

6.2 She would be paid an hourly rate of £15 in arrears.

6.3 She would be entitled to an annual holiday entitlement of 16 working days plus bank holidays. The leave year ran from one April each year.

6.4 She would be entitled to one week's notice pay if employed for one month but less than two years and then one week for each completed service up to a maximum of 12 weeks.

7. It is agreed that the claimant had periods of absence on the grounds of ill-health throughout her employment. The most recent of these began on 18 February 2020, and the final fit note for that period notified the respondent that she was fit to return to work on 16 June 2020. The claimant was certified sick again on 18 September 2020.

8. The background to this claim is a dispute between the respondents and the local NHS Commissioners in respect of the termination on 25 September 2020 of the Practice's NHS contract following an unfavourable CQC report. In a nutshell, it is the respondents' position that nefarious activities, conspiracy, fraud and so on by the Commission resulted in the practice being significantly under-resourced, leading to the unsatisfactory CQC report and to the termination of the NHS contract. The respondents therefore argue that what I describe below was not of their own doing, but rather circumstances forced upon it. I cannot and do not make any findings of fact as to whether the Commission acted in the way alleged

9. I should also note there have been accusations by both parties of inappropriate behaviour on both of the part of the other. They can be dealt with simply by observing that at no stage does it appear that that the claimant was disciplined for any alleged misconduct, nor indeed did misconduct play any part in the termination of her employment. Neither, on the other hand, did the claimant resign because of alleged misconduct on behalf of the respondents or their agents. Beyond that I need make no findings.

10. When the claimant began her final period of sickness absence on 18 February 2020, around six weeks of that leave year remained. The claimant says she had taken no leave whatsoever in that leave year. Mr Rafiq says that she had plenty of time off, some of it

certified, some of it not, and that she was effectively the arbiter of her own leave. Whether that is right or wrong, the fact remains that there should be within the respondent's possession or control a record of the leave that the claimant took. The respondents provided no evidence whatsoever to contradict what the claimant says and I was not satisfied that Mr Rafiq had any reliable recollection of the claimant's periods of leave. Consequently, I accept that, by the time the claimant went sick, she had not taken any of her accrued leave entitlement for that year. Thereafter, the claimant was unable to take leave for the remainder of the leave year because she was sick.

11. On 16 June 2020, the claimant notified the respondents that she had been told by her GP that she was fit to return. It is the claimant's case that she was told that she was not to return to the workplace without Mr Majid's express permission, which she never received. Mr Majid's evidence in this respect is far from certain. At one point he said that he could not remember being so rude but that, he had been, he apologised. At another point, he seemed absolutely to deny having been so rude. The claimant, on the other hand, was entirely unshakeable on this point. Applying the balance of probabilities, I prefer the claimant's account. From 16 June 2020, the claimant was ready, willing and able to work and so was entitled to be paid. However, she claims, and I accept, that the respondent did not make any further payments to her during her employment.

12. The claimant does not appear to have taken (and certainly was not paid for) and period of leave between commencement of her final leave year and termination of her employment.

13. The claimant was signed off sick once again on 18 September 2020 and, to her credit, does not claim any unpaid wages from that date, as her sick pay entitlement was exhausted by then.

14. The practice closed on 25 September 2020, and the claimant had no role available at the practice thereafter. The claimant received no notice that her employment had transferred to another practice. Indeed, it seems that she received absolutely no communications whatsoever about what was happening with her employment after 25 September. I have seen no evidence that there was in fact a transfer of the claimant or indeed any of the workforce from the respondent any other practice. In the circumstances, I am not satisfied that there was any transfer of the claimant's employment from the respondents.

15. Mr Rafiq was ambiguous about whether the claimant has in fact been dismissed by the practice. However, it is plain that she has not been paid nor communicated with by the practice (save in respect of this claim) since 25 of September 2020, and I find that she was dismissed on that date.

16. The respondents' need for employees to carry out administrative work, or indeed any work, had ceased. Consequently, I find the reason for the claimant's dismissal to have been redundancy.

17. It would appear that some correspondence was entered into between the parties after termination of the claimant's employment with regards to the unfortunate state of affairs that had arisen. Within that correspondence, there is evidence of the claimant complaining of the matters comprising this claim, and a substantive response from the respondent. This is the no evidence that having received that response the claimant then appealed what effectively had been a dismissal of her grievance.

The Law

Unfair Dismissal

18. Pursuant to s94 of the Employment Rights Act 1996 (ERA), an employee is entitled not to be unfairly dismissed by his employer.

19. Section 98 ERA provides:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
> (2) A reason falls within this subsection if it—
> …
> (c) is that the employee was redundant,
> …
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.
> …

20. It is for the employer to prove its reason for dismissing the claimant and that it is a potentially fair reason. Thereafter, the Tribunal will determine the question of fairness pursuant to s98(4) ERA with no burden of proof on either party.

21. A reason for the dismissal of an employee is a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee (**Abernethy v Mott, Hay and Anderson [1974] IRLR 213**).

22. Dismissal by redundancy is defined in s139 ERA, and in particular subsection (1) provides:

> (1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
> (a) the fact that his employer has ceased or intends to cease—
> (i) to carry on the business for the purposes of which the employee was employed by him, or
> (ii) to carry on that business in the place where the employee was so employed, or
> (b) the fact that the requirements of that business—
> (i) for employees to carry out work of a particular kind, or
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
> have ceased or diminished or are expected to cease or diminish.

23. A fair redundancy normally requires adequate warning and consultation, the identification and application of a fair process (including the use of selection criteria which are as objective as reasonably possible) and an reasonable attempts to find alternative employment for the displaced employee (**Williams v Compair Maxim Ltd [1982] IRLR 83**). The question in each respect is whether the employer acted within the range of reasonable responses.

24. Pursuant to s118 ERA, where a tribunal makes an award for unfair dismissal it shall comprise a basic award and a compensatory award.

25. If an employee is unfairly dismissed by reason of a procedural defect, the Tribunal may make a reduction in compensatory award to reflect the chance that he would have been dismissed in any event, pursuant to s123(1) ERA and **Polkey v AE Dayton Services Ltd [1988] AC 344**.

Unauthorised Deductions from Wages

26. Pursuant to section 13 of the Employment Rights Act 1996 (ERA), a worker has the right not to suffer unauthorised deductions from his wages. The definition of 'wages' includes 'any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise' (section 27(1)(a) ERA). However, any payment by way of a loan or advance of wages, and any payment to the worker otherwise than in his capacity as a worker, are excluded from the definition of wages pursuant to ss27(2)(a)&(e) ERA respectively.

Holiday Pay

27. Unless the relevant contract provides for a more generous entitlement an employee/worker is entitled to 5.6 weeks' paid leave every year (regulations 13, 13A and 16 of the Working Time Regulations 1998). The employee/worker is entitled on termination of engagement to payment in lieu of accrued and untaken holiday (regulation 14).

28. If an employee is unable to take leave in a particular leave year because of ill-health absence then the unused entitlement carries over, if necessary, to the next leave year (**HMRC v Stringer C-520/06 [2009] IRLR 214**).

Notice Pay

29. An employee may bring a claim in the Employment Tribunal for damages for breach of contract arising from or outstanding on termination of his employment under article 3 of the Employment Tribunals Extension of Jurisdiction Order (England and Wales) Order 1994.

30. An employee who has been employed for more than one month but less than two years is contractually entitled to a minimum of a week's notice of termination of employment . and thereafter is entitled to one week's notice per completed year of service, to a maximum of 12 weeks' notice (s86 ERA).

Conclusions

31. The claimant was dismissed by the respondents on 25 September 2020 by reason of redundancy. No procedure whatsoever was followed and so the dismissal was unfair. However, she would inevitably have been dismissed on 25 September 2020 even had a fair procedure been followed and so she is entitled to no compensatory award. She had by then been employed by the respondent for around 3 ½ years and was aged 38. Her weekly wage was £360 (24 hours at £15 per hour). She is, therefore, entitled to a basic award of £1.080.

32. The claimant was dismissed without notice. She was entitled to 3 weeks' notice and so suffered damages for breach of contract totalling £1,080.

33. The claimant was ready willing and able to work for a 13-week period between 16 June and 18 September, during which time the respondents refused to allow her to return to work and did not pay her any wages. They were not entitled in the circumstances to withhold the claimant's wages and so she is awarded compensation of £4,680 gross.

34. The claimant had not taken any holiday in her penultimate leave year prior to starting a period of sickness absence on 18 February 2020. She was thereafter unable because of sickness to take any of her leave entitlement, totalling for that year 5.6 weeks. She worked 4 days each week and so the accrued but untaken total of 22 days carried over to her final leave year. In that leave year, she accrued but did not take a further 11 days. The claimant's daily pay amounted to £90 and so she is entitled to pay in lieu of the untaken 33 days' holiday, a total of £2,970.

35. To the extent that any of the sums above might be amenable to uplift or reduction due to a failure to follow the ACAS Code of Practice on Discipline and Grievances at Work, I find that both parties failed to follow the Code at one stage or another and find that no adjustment would be in the interests of justice and equity.

36. The respondents are jointly and severally liable for the matters above and shall pay the above sums, totaling £9,810, by 27 July 2021.

Employment Judge O'Brien

4 October 2021