EMPLOYMENT TRIBUNALS

Claimant: Mr E N Agbongiague

Respondent: J.e.m Care Limited

HELD AT: Manchester (by CVP) **ON:** 12 October 2021

BEFORE: Employment Judge Warren

REPRESENTATION:

Claimant: Mr Montague, Solicitor
Respondent: Ms S Younis, Litigation Consultant

JUDGMENT having been sent to the parties on 10 January 2022 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

Background

1. The claimant was employed as a care worker with the respondent company from the 9 September 2019 for 30 hours a week. He presented a claim to the Tribunal for holiday pay, arrears of pay, failure to provide contractual terms and breach of contract (notice pay) on 20 November 2020, having commenced early conciliation with ACAS on 4 September 2020. The claimant did not have sufficient qualifying service to bring an unfair dismissal claim but alleges that he was dismissed and that his claims fall from that dismissal. The respondent argued that the claimant was dismissed on 16 December 2019 following a disciplinary meeting, and as such his claims were not brought within the statutory time limit, and there was no reason for this. The statutory time limit would be three months from the date when the cause of action arose, plus early conciliation time.

The Evidence

2. The claimant gave evidence in his own regard, Ms Niven (Home Manager) and Ms C Brown (Minute Taker at the meeting).

3. I applied the evidential test "the balance of probabilities" to the evidence I heard and read. There was an agreed bundle of documents. In relation to the four claims brought by the claimant the burden of proof remained with him throughout. I found Ms Niven to be a particularly impressive witness. Her evidence was corroborated by that of Ms Brown. I found myself preferring the evidence of the respondent witnesses over that of the claimant. All witnesses gave evidence on oath and were cross examined.

The Issues

4. The real issue in this case was the date of dismissal of the claimant. The claimant denied much of the respondent's case and was adamant that he had not been dismissed and in fact was still an employee to the date of the hearing. He accepted however that he had not worked since 16 December 2019.

The Facts

5. These are the facts I have found following hearing all of the evidence, cross examination, re-examination and reading the bundle. I noted that the induction pack for the claimant was added to the bundle at a late stage.

6. The respondent owns a care home where the claimant was employed as a Care Assistant from 19 September 2019. His contract of employment specified that he worked 30 hours a week. By the beginning of December 2019 Ms Niven, the Home's manager, was receiving complaints from the staff about the claimant and she invited him to attend an investigatory meeting following suspending him on full pay.

7. The complaints ranged from not doing domestic work to an allegation of sexual harassment and finally an allegation that he had refused to assist a care worker to pick up a fallen resident, because he said that he was within five minutes of the end of his shift.

8. The investigatory meeting was eventually held on 16 December 2019. Present at the meeting was Ms Niven, Manager, and Ms Carol Brown, note taker. The various allegations were put to the claimant and he denied the sexual harassment but agreed that he had been at the end of his shift when a resident had fallen and he had not been prepared to help. It is fair to say that up to the point of this admission the investigation meeting would have either gone to a full disciplinary hearing or the allegations would have ended there. However, Ms Niven was clearly furious (it still showed in her demeanour) that the claimant had refused to help another care worker to lift a fallen resident. She saw this as a safeguarding failure and was passionate about the care of her residents. Still in the investigatory meeting, she dismissed the claimant and said so more than once. The claimant laughed at her. It was very obvious that this hadn't helped. The claimant was paid to 20/12/19 and he did

not undertake a further shift from 16 December. It was accepted by the respondent that they had not paid him one week's notice pay and that they owed him 1.8 hours holiday pay. On 17 December a letter was sent to the claimant to his home address confirming the outcome of the 16 December meeting. The claimant says he didn't receive that letter. However, he did commence full time work with another company on 10 February 2020. He did not actively seek to confirm why the respondent was failing to offer him any work and was unable to explain his reticence. This simply did not make sense and made the claimant less credible than the respondent witnesses.

9. On 11 February 2020 he sought what he said was the outcome of the investigation hearing. His emails to the respondent were found months later in their spam. His solicitors wrote in July 2020 to the respondent and received a letter in response on 11 July 2020 confirming that the claimant had been dismissed on 16 December 2019.

10. The claimant continued to insist in his evidence that he was still an employee and had not been dismissed. Ms Brown confirmed Ms Niven's account, in her evidence and under cross examination, the claimant had been clearly verbally been dismissed on 16 December 2020. He had not been dismissed for any allegations other than that of failing to help a resident when asked to do so.

The Law

11. I reminded myself that this is not a claim for unfair dismissal as the claimant is not a qualifying employee. As an employee with more than one month's service, he was entitled to one week's notice or compensation in lieu for breach of contract. He was also entitled to be paid for any annual leave he had accrued and not yet taken at the date of dismissal. The claimant was entitled to be paid his wages to the date of his dismissal. He was also entitled to have a statement of his terms and conditions. All of these claims had to be brought within the statutory time limit of three months plus early conciliation from the effective date of termination. There were two potential effective dates of termination – the 16 December 2019 and 11 July 2020. Both parties agreed that if the effective date of termination was 16 December 2019 then the claim was out of time. If the effective date of termination was the 11 July 2020, then the claim was potentially in time.

Conclusion

12. I am satisfied that the claimant was dismissed on 16 December 2019 and he just chose not to take it seriously, laughing as he left the meeting. I find corroboration of that fact in that he sought and obtained a full-time contract elsewhere on 10 February 2020. He knew he had been dismissed. It was a nonsense to consider himself still an employee of the respondent after that. That being the case the entire claim is out of time and the Tribunal has no jurisdiction to hear it. It noted that the respondent had indicated they would pay any outstanding money to the claimant regardless of the outcome of the case.

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Employment Judge Warren
9 June 2022

REASONS SENT TO THE PARTIES ON
10 June 2022

FOR THE TRIBUNAL OFFICE