Case Number 2202516/2020**(V)**

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
A Algosh	**v**	**Care Property Management Ltd**

Heard at: London Central (by video) **On**: 5 and 6 January 2021

Before: Employment Judge P Klimov, sitting alone

Representation

For the Claimant: in person

For the Respondent: did not attend and was not represented

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable due to the Coronavirus pandemic restrictions and all issues could be determined in a remote hearing.

JUDGMENT having been sent to the parties on 6 January 2020 and reasons having been requested by the claimant, in accordance with Rule 62(3) of the Rules of Procedure 2013.

The claimant requested written reasons by an email he sent to the tribunal on 15 January 2021. Unfortunately, due to London Central Tribunal's closure on 18 December 2020 for COVID safety reasons and resulting restrictions on the staff and judiciary accessing the paper files and the tribunal's case management IT system, his request was not picked up and passed on to me until 23 February 2021. I apologise for the delay in dealing with the claimant's request.

REASONS

Background and Preliminary issues

1. By a claim form presented on 25 April 2020 the claimant brought a claim for unfair dismissal and breach of contract (notice pay).

2. The claimant claims that the respondent dismissed him unfairly and without notice and seeks compensation. The claimant says that he was dismissed by his manager, Mr Pritam Kotian, because Mr Kotian thought that the claimant would testify against the respondent in employment tribunal proceedings brought against the respondent by another former employee alleging sexual harassment. The claimant denies that and says that he was never asked to be a witness in any such proceedings. The claimant did not present a claim of victimisation and was not seeking before or at the hearing to amend his claim to include such complaint.

3. The circumstances of the claimant's dismissal are as follows. The claimant was suspended by the respondent without pay on 5 July 2019. Following his suspension, the claimant tried to contact the respondent several time to find out what was happening, but Mr Kotian did not return his calls and text messages. On 12 February 2020, the claimant's solicitor telephoned the respondent and spoke with Mr Kotian. Mr Kotian told the solicitor that the claimant was dismissed.

4. On 24 August 2020, Peninsula Business Services Ltd presented a "blanket denial" ET3 on behalf of the respondent. The response form indicated that the respondent wished to defend the claim, and in box 6.1 ("please set out the facts upon which you rely on to defend the claim") gave the following response.

> "*Yes.*
>
> *The Respondent resists the entirety of the Claimant's claims set out below, save as for hereby expressly admitted. In the event that the Claimant and/or the Tribunal deem that the Respondent has not responded to a specific allegation contained within the Claimant's particulars of claim, this should not be taken as an admission on the Respondent's part as to its factual basis. All of the Claimant's allegations and claims are denied.*
>
> *The Respondent understands the Claimant to claim unfair dismissal, damages and reputation defamation."*

5. Together with the "blanket denial" ET3, the respondent made an application for an extension of time to present ET3. The Tribunal accepted the response form because it was presented in time. No further particulars of the grounds of resistance were presented by the respondent.

6. On 5 October 2020, the respondent's representatives informed the Tribunal that they were no longer acting for the respondent, and that Mr Kotian should be contacted for all future correspondence.

7. Before these proceedings, on 11 November 2019, the claimant brought a claim against the respondent for unlawful deduction from wages arising from his unpaid suspension (case number: 2204860/2019).

8. The respondent failed to present a response to that claim and did not attend the final hearing on 11 March 2020.

9. Employment Judge Brown found that the respondent had made unlawful deduction from the claimant's wages from 5 July 2019 to the date of the Tribunal hearing (11 March 2020) and ordered the respondent to pay the claimant the sum £16,910 (gross) on account of the unlawful deductions. That sum included 25% uplift under s.207A of TULR(C)A 1992 because of the respondent's unreasonable failure to follow the ACAS Code on Disciplinary and Grievance Procedures.

10. The respondent did not voluntary pay the sums awarded, and the claimant commenced enforcement actions, including on 8 December 2020 obtaining a third-party debt order against the respondent's bank.

11. At the hearing on 11 March 2020, the claimant appeared in person. It appears that he did not tell EJ Brown that on 12 February 2020 the respondent had told his solicitors that he was dismissed. Therefore, in her judgment she found that as at the date of the hearing the claimant was still employed by the respondent and made her award on that basis.

12. In his ET1 in this case the claimant stated that the end date of his employment was 12 February 2020. The respondent's ET3 did not have either "Yes" or "No" boxed ticked in the question: "Are the dates of employment given by the claimant correct?".

13. The notice of the hearing was sent to the parties on 27 July 2020 together with the standard case management orders. The respondent failed to comply will all case management orders. It did not disclose any documents, did not present any witness statements, and did not otherwise engage in the proceedings.

14. On 4 January 2021 at 11:35, I wrote to the parties with instructions to email me the hearing bundle and witness statements for the hearing the following day.

15. Mr Kotian for the respondent replied at 14:02 saying that due to Covid restrictions the respondent was not able to prepare a bundle and send it to its "legal team" for onward transmission to the Tribunal. He requested a postponement of the hearing until after Covid restrictions were lifted.

16. At 14:29 I wrote to the parties refusing the respondent's application because it had been presented less than seven days before the date of the hearing, and none of the grounds set out in Rule 30A(2) of the Employment Tribunals Rules of Procedure 2013, under which the postponement may be ordered, were made out in the application.

17. At 15:13 Mr Kotian asked for a reconsideration of my decision. I reconsidered it, and at 15:47 wrote to the parties confirming my decision to reject the respondent's application to postpone the hearing.

18. On 5 January 2021, the hearing started at 10am via video. The claimant joined the hearing. The respondent did not join the hearing. I asked my clerk to contact Mr Kotian and ask him to join the hearing. She did, and Mr Kotian joined the hearing but did not turn on his microphone or camera. He stayed in the video hearing room for a couple of minutes and then got himself disconnected.

19. I asked the clerk to call him again. She did, but his telephone was switched off. She left him a voice message telling him that the hearing will start at 10:30am and if he did not join a judgment could be made against him.

20. At 10:23, Mr Kotian sent an email saying that he tried but could not join the hearing and that he was on his way to a doctor's appointment. He asked for the hearing to be postponed.

21. I considered his request. I was not satisfied that Mr Kotian had genuine technical issues which prevented him from joining the hearing. His request for a postponement of 4 January 2021 did not say that he was seeking a postponement on medical grounds. Therefore, I decided that the hearing should proceed.

22. The hearing started at 10:30, however, it soon transpired that some documents were missing from the bundle, and I adjourned the hearing until 13:00 for the claimant to find and submit the missing documents.

23. At 11:20 I wrote to Mr Kotian in the following terms:

"On 4 January 2021, your request for a postponement had been rejected, and upon your request for reconsideration the decision was confirmed as correct. That was communicated to you giving the reasons on 4 January 2021.

You were able to join the hearing, but did not switch on your camera and microphone, as you were instructed by the clerk. You then got yourself disconnected and switched off your mobile phone, so that the clerk could not contact you. The clerk left you a voice message explaining that the hearing would be starting at 10.30am and if you did not join it, the hearing would proceed without you and a judgment may be made against you.
In your application for a postponement of yesterday, you did not say that you had a medical appointment and did not provide any evidence of the same. The date of the hearing was fixed for some time, and it was your responsibility to ensure that you or your representative were available to participate in the hearing. The clerk explained to you that you needed to join the hearing and make your representations to the judge concerning your medical appointment.

I am therefore satisfied that there were no good reasons why could not join the hearing today. On the balance of probabilities, I find that you deliberately chose not to participate in the hearing, and therefore under Rule 47 of the Employment Tribunals Rules of Procedure I can proceed to hear the case in your absence.

The hearing started at 10.30am. After clarifying a chronology with the claimant, the hearing was adjourned until 13.00 to enable the claimant to submit additional documents requested by the tribunal. You will be copied on these.

The hearing will resume at 13.00 on the same link. You are strongly encouraged to join the hearing."

24. The hearing continued at 13:00. Mr Kotian did not join the hearing. I proceeded with the hearing in the respondent's absence and have determined the liability issues.

25. At 13:01, Mr Kotian replied to my email attaching screen shots of his phone to demonstrate that he had tried to join the hearing but could not connect the phone's camera and microphone. The time stamp on the screen shots was 12:26.

26. In that email he also said that he was at the doctor's, that he was in extreme pain, that his doctor had referred him to the hospital and that where he was. He attached a GP referral letter, which said that Mr Kotian had presented himself to his GP with a complaint of a 16 hours' history of right sided lower abdominal and testicular pain. The letter said that the pain started at 16:00 on 04/01/21. The letter did not say that Mr Kotian needed an urgent hospitalisation or otherwise would not be able to participate in a tribunal hearing via video.

27. Because the hearing re-started at 13:00, I did not see Mr Kotian's email until after, having determined the liability issues, I adjourned the hearing at 14:00 until 10:00 the following day for the claimant to submit an updated schedule of loss and mitigation documents, to help me to determine remedy issues.

28. At 14:52, I wrote to Mr Kotian that the issues of liability had been determined, and the hearing had been adjourned until 10:00 the next day, and telling him that if he joined the hearing the next day he would be allowed to make his submissions on the issues of remedy.

29. On 5 January 2021, at 09:52, Mr Kotian replied saying that he was ill and due to Covid restrictions he was unable to provide his documents to the Tribunal. My refusal to postpone the hearing made him more sick, and he was not able to recover sooner. He stated that he was in the hospital expecting a surgery. Finally, he stated that he had documents to show that a proper procedure was followed to dismiss the claimant and requested an extension to gather evidence.

30. On 5 January 2021, the hearing started at 10:00, and I asked the clerk to contact Mr Kotian to check whether he intended on joining the hearing. She could not get hold of him. I adjourned the hearing until 11:15 and at 10:20 sent an email to Mr Kotian on the following terms:

"In order for the tribunal to consider your request to postpone the hearing you must provide a medical certificate satisfying the following requirements:

When a party or witness is unable for medical reasons to attend a hearing. All medical certificates and supporting medical evidence should be provided in addition to an explanation of the nature of the health condition concerned. Where medical evidence is supplied it should include a statement from the medical practitioner that in their opinion the applicant is unfit to attend the hearing, the prognosis of the condition and an indication of when that state of affairs may cease.

You must provide the certificate by 11.15am, today, 6 January 2021, otherwise the hearing will proceed in your absence."

31. No response was received from Mr Kotian. I decided that the hearing should proceed. I was not satisfied that Mr Kotian had genuine technical or medical reasons preventing him from joining and participating in the hearing. The respondent knew of the hearing date as early as 27 July 2020. Apart from sending a "blanket denial" ET3, it failed to take any steps to defend the claim. The respondent did not explain why Covid restrictions had prevented it from sending document to its "legal team". No medical evidence were provided to show that Mr Kotian could not participate in the hearing by video. The respondent's conduct in the previous proceedings suggested that it was simply trying delay the proceedings to avoid a judgment being made against it. There were no other good reasons why the hearing should not proceed to determine remedy issues.

Findings of fact

32. Having considered all the evidence presented to me at the hearing I make the following findings of fact.

33. The claimant was employed by the respondent as a night receptionist in the respondent's hotel. His period of continuous service commenced on 20 December 2013.

34. On 28 June 2019, when the claimant was on his annual leave, his manager, Priam Kotian, told the claimant that they needed to have a chat before he could allow the Claimant to come back to work.

35. On 5 July 2019, Mr Kotian met with the claimant and told him that he was suspended. He told the claimant that the reason for the suspension was because the claimant was intending to give evidence against the respondent at a forthcoming employment tribunal claim brought by another former employee. The claimant denies that he had any such intentions or was ever asked by the former employee to give evidence against the respondent.

36. Mr Kotian told the claimant that he would send the claimant an email confirming his suspension, but he never did. The claimant tried to contact Mr Kotian by email and text, to receive a written outcome and an update on his situation. Mr Kotian never responded to the claimant.

37. The claimant instructed a firm of solicitors to assist him in that matter. On 12 February 2020, his solicitor telephoned and spoke with Mr Kotian, who told the solicitor that the claimant was dismissed.

38. From 5 July 2019 until his dismissal the claimant remained on suspension without pay. He was not invited to any disciplinary meeting and was not presented with any disciplinary case to answer.

39. The claimant regular working hours were 40 hours per week. His rate of pay was £9.50. His average week's pay was £380.

40. Under the terms of his contract of employment he was entitled to receive six weeks' written notice of termination. The respondent dismissed the claimant on 12 February 2020 without notice or pay in lieu.

41. On 15 March 2020, the hotel where the claimant worked closed due to Covid.

42. Following his dismissal, the claimant tried to find alternative employment, but due to Covid restrictions was not able to secure any job in the hospitality sector. He applied for jobs in supermarkets, a car tyres' shop, in cleaning services and others. He took a driver's test for Uber, but due to an eye condition, which necessitated a surgery, was not able to proceed with that job opportunity.

43. From February 2020 he receives Universal Credit benefit payments.

44. As at the date of the hearing he remains unemployed.

The Law and Conclusions

Breach of Contract (wrongful dismissal)

45. The respondent clearly breached the claimant's contract of employment by dismissing him without giving him six weeks' notice in writing, and therefore is liable to pay the claimant the gross sum of £2,280 as damages for breach of contract.

Unfair dismissal

46. Section 94 of the Employment Rights Act 1996 (ERA) states that an employee has the right not to be unfairly dismissed. This right is subject to the employee having at least two years of continuous service before the effective date of termination, which the claimant has.

47. Section 98 of ERA states (my underlining):

"(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—

(b) relates to the conduct of the employee,

48. *If the employer shows that the reason for the dismissal is a potentially fair reason under section 98(1), the tribunal must then consider the question of fairness, by reference to the matters set out in section 98(4) ERA which states:*

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.

49. The respondent presented a "blanket denial" response. It did not state what the reason for the claimant's dismissal was or why in the circumstances it was reasonable for it to dismiss the claimant for that reason. The respondent did not dispute that the claimant's effective date of termination was 12 February 2020.

50. Therefore, I find that the respondent failed to show that it dismissed the claimant for a potentially fair reason, and consequently the dismissal was unfair.

51. Further and in the alternative, on the evidence available to me, on the balance of probabilities, I find that the principal reason for the claimant's dismissal was a reason related to his conduct, namely the respondent's belief that the claimant would be giving witness evidence against the respondent in employment tribunal proceedings brought by another former employee of the respondent.

52. While under s.98(2) of ERA conduct is a potentially fair reason, I find that in the circumstances the respondent acted unreasonably in treating the claimant's conduct as a sufficient reason for dismissing him.

53. In misconduct cases, in determining the fairness of the dismissal the tribunal must have regard to the test set out in British Home Stores v Burchell [1978] IRLR 379. The three elements of the test are:

    a. Did the employer have a genuine belief that the employee was guilty of misconduct?
    b. Did the employer have reasonable grounds for that belief?
    c. Did the employer carry out a reasonable investigation in all the circumstances?

54. The tribunal must then determine whether the employer's decision was within the range of reasonable responses which a reasonable employer could come to in the circumstances. It means that the tribunal must review the employer's decision to determine whether it falls within the range of reasonable responses,

rather than to decide what decision it would have come to in the circumstances of the case.

55. Based on my findings of fact, I have no hesitation in concluding that the respondent has failed one every element of the Burchell test, and in those circumstances the decision to dismiss fell outside the range of reasonable responses and therefore was unfair.

Polkey reduction

56. In any case where the employer has dismissed for a substantively fair reason but has failed to follow a fair procedure, the compensatory award (but not the basic award) may be reduced to reflect the likelihood that the employee would still have been dismissed in any event had a proper procedure been followed. Such reduction can be reflected by a percentage representing the chance that the employee would have been dismissed. In exceptional cases the award can be reduced to nil if it can be shown that a fair procedure would have resulted in a dismissal anyway (*Polkey v AE Dayton Services Ltd 1988 ICR 142, HL*).

57. I find that if a fair procedure had been followed the claimant would not have been dismissed. Even if the claimant were planning to give evidence against the respondent in another employment tribunal claim for sexual harassment (which he denies), it would not be reasonable for the respondent to dismiss him for that reason. Such dismissal would be an act of victimisation contrary to the Equality Act 2010 and therefore unlawful and clearly outside the range of reasonable responses open to a reasonable employer.

Blameworthy contributory conduct

58. Section 122(2) of ERA states that*: "Where t*he *tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent.*"

59. Section 123(6) of ERA states that*: "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding"*

60. I do not consider that the claimants conduct was such that it would be just and equitable to reduce either the basic award or the compensatory award. Even if he were intending on giving evidence against the respondent in another employment tribunal case (which he denies), such conduct would not be in any way culpable or blameworthy.

ACAS Code of Practice on Disciplinary and Grievance Procedures

61. Under section 207A TULR(C)A 1992 , in the case of proceedings relating to a claim by an employee under any of the jurisdictions in Schedule A2 to that Act, if it appears to the Tribunal that the claim to which the proceedings relate concerns a matter

to which a relevant Code of Practice applies and the employer has unreasonably failed to comply with the Code in relation to that matter, the Tribunal may, if it considers it just and equitable in all the circumstances of the case to do so, increase any award it makes to the employee by no more than 25%.

62. Schedule A2 of TULR(C)A 1992 includes claims under s 111 ERA 1996 for unfair dismissal.

63. The respondent failed to comply with the Code in every possible respect, from the way it handled the claimant's suspension to his dismissal without giving the claimant any opportunity to answer a disciplinary charge against him. It effectively imposed a disciplinary sanction during the suspension, following an investigatory meeting only, without inviting the claimant to a disciplinary meeting where he had the right to be accompanied, without giving him a disciplinary outcome in writing and without affording him any right of appeal.

64. These were very serious breaches of the Code and the respondent's failure to comply with it was clearly unreasonable. I am satisfied that it is just and equitable to apply a 25% uplift to the compensatory award.

Compensation for unfair dismissal

65. The claimant's date of birth is 7 June 1984. At the effective date of termination, he had six years of continuous service. Therefore, the basic award for unfair dismissal shall be calculated as 1 x 6 years' service x £380 = £2,280

66. Considering the claimant's length of service, I find it is just and equitable to award him £400 for loss of statutory rights.

67. On the balance of probabilities, I find that if the claimant had not been unfairly dismissed by the respondent on 12 February 2020, he would have been put on furlough due to the closure of the hotel on 15 March 2020, and his pay would have been reduced to 80% of his usual salary.

68. I am satisfied that the claimant took reasonable steps to mitigate his loss.

69. Because the claimant received an award for unlawful deduction from wages for his previous claim, which award also covered the period after his dismissal up to 11/03/2020 (the date of the hearing), the sum of £1,520 must be deducted from the claimant's immediate loss to avoid double recovery for that period.

70. Damages awarded for wrongful dismissal (£2,280) shall be deducted from the claimant's immediate loss.

71. I find the total amount of the claimant's immediate financial loss is £9,476.09.

72. Considering the circumstance of the pandemic and its impact on the hospitality sector, and taking into account the claimant's unsuccessful attempts to find alternative employment, I find that the claimant's losses are likely to continue for 15 weeks following the date of the hearing.

73. I calculated the claimant's compensatory award based on his normal wages until 15 March 2020 and his "furlough pay" thereafter. Therefore, I find the claimant's future loss is £4,120.80.

74. Considering the total value of the future loss, the current banks' interest rates and a relatively high likelihood of the claimant having to enforce the award through the courts and bailiffs, I do not consider it will be just and equitable to reduce the compensation for future loss to reflect the accelerated receipt.

75. Applying a 25% uplift for the respondent's unreasonable failure to comply with the ACAS Code of Practice to the compensatory award gives the total compensatory award of £16,996.11. Together with the basic award (£2,280) the total compensation for unfair dismissal is £19,276.11, which in all the circumstances of the case and having regard to the claimant's financial loss sustained in consequences of the dismissal, I find to be just and equitable and order the respondent to pay this sum to the claimant, subject to the recoupment provisions.

76. Because the claimant is in receipt of the Universal Credit benefit, under regulation 4 of the Employment Protection (Recoupment of Benefits) Regulations 1996, there is a prescribed element to the award of £11,345.11. The prescribed period is from 25 March 2020 (end of the period over which damages for wrongful dismissal have been awarded) to 06 January 2021 (conclusion of the tribunal proceedings).

77. The detailed calculations of the award and recoupment are set out in my judgment of 6 January 2021.

78. I reject the claimant's claim for £480 his legal costs. This cost had been incurred by the claimant before the claimant brought these proceedings. The legal fees involved in bringing an unfair dismissal claim cannot be included in a compensatory award (Nohar v Granitstone (Galloway) Ltd 1974 ICR 273, NIRC). The claimant was not represented in these proceedings by a solicitor.

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Employment Judge P Klimov
25 February 2021

Sent to the parties on:

26/02/2021

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For the Tribunals Office

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