EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Joseph	v	Kuklous Healthcare Limited

Heard at: Watford
On: 1 February 2024
Before: Employment Judge Hunt

Appearances
For the Claimant: In person
For the Respondent: Ms Veimou (representative)

JUDGMENT having been sent to the parties on 19 February 2024 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided.

REASONS

1. The Claimant was employed by the Respondent as a manager until his dismissal on 8 February 2023. He brought several claims against the Respondent. His claim for unfair dismissal was dismissed by Employment Judge Daley after a hearing in October 2023. The Judge found that the Claimant was an employee of the Respondent (a point that had been in dispute) but had not been employed for the qualifying period of two years to bring such a claim. The remaining claims for me to determine were a complaint of wrongful dismissal/unpaid notice pay, unpaid annual leave, unpaid wages and/or breach of contract relating to the non-payment of other contractual entitlements, notably a portion of company profits and an allocation of company shares.

2. Employment Judge Daley provided written reasons for their decision on 11 March 2024, which outlines much of the background facts relating to the parties' employment relationship. I will not repeat that here.

The Issues

3. The issues before me were discussed at the outset of the hearing and they were agreed as follows.

    2.1 In relation to notice pay, whether the Claimant was contractually entitled to one weeks' notice or one months' notice.

    2.2 In relation to holiday pay:

2.2.1 whether the Claimant was entitled to statutory minimum holiday pay or to seven and a half weeks of paid holiday; and

2.2.2 how many days of paid leave the Claimant had taken during the leave year starting 1 April 2022.

2.3 In relation to the claim for arrears of pay, whether the Claimant had been properly paid for the month of February 2023.

2.4 In relation to the other contractual entitlements:

2.4.1 whether the Claimant was entitled to a share of profits and to what extent; and

2.4.2 whether the Claimant had an entitlement to an award of company shares.

2.5 Whether an award under s.38 of the Employment Act 2002 would be appropriate for any failure of the Respondent to provide a statement of employment particulars to the Claimant.

4. In deciding these issues, I was presented with a bundle of documents extending to 119 pages (121 including the index). When I refer to pages in the bundle in my judgment, I have sought to refer to the numbered pages of the bundle.

5. I heard evidence from three people: the Claimant, the Director of the Respondent (Mrs Qureshi, the "Director"), and the owner of the Respondent company (Dr Qureshi, the "Owner") who had had extensive practical involvement in the appointment of the Claimant and possibly some practical oversight of the running of the company. Both parties also made submissions, and I am very grateful to them all for their contributions and their cooperation.

The Facts

6. In determining some of the issues, I must make findings of fact. When I do so, those findings are on the balance of probabilities, taking account of the statements that I received, the evidence that I heard and the documents that were produced and presented to me in the bundle.

7. It became clear that there were certain documents that had not been provided to the Tribunal, whether intentionally or because they cannot be located. Accordingly, I made my findings based on the information available.

8. As to the beginning of the parties' relationship, an email at page 51 of the bundle is entitled "Head of Terms". This was an email from the Owner to the Claimant. The email begins:

> "As per our discussions, please find below the draft head of terms we agreed in the various conversations in the job offer as manager and also in developing a partnership for the supported living business in London".

9. It is clear that various prior discussions had taken place between the Owner and the Claimant, which concurred with the oral evidence I heard. The parties

had clearly agreed to enter into some form of relationship to establish a new supported living operation in London. The Respondent wished to specialise in providing supported living services to people with sometimes very severe mental health conditions.

10. There was much debate at the hearing (and prior) about the Claimant's precise role and the terms of his relationship with the Respondent. Employment Judge Daley has found that the agreement between the parties was one of employment. The parties before me today have accepted that finding and I proceeded on that basis. Nevertheless, it is important to recognise that this decision has caused some difficulty in determining the issues before me because the parties were often attempting to piece together the past as if they had both considered from the outset that they were in an employment relationship. In reality, it is unclear that that was in fact the parties' initial understanding, certainly as far as the Respondent was concerned.

11. One such difficulty was establishing the terms of the parties' contract of employment. Again, there was much debate at the hearing about what those terms were. Ultimately, I place greatest weight on the email at page 51, as this is a contemporaneous, objective, and relatively detailed record of the terms of the job offer. The parties had clearly entered into an agreement for the Claimant to work for the Respondent. He proceeded to do so for close to two years. I was presented with no other documents that explained the terms of employment. Indeed, the parties seemed subsequently to abide by the terms that were laid down including as to pay of £35,000 a year. Perhaps unsurprisingly this was confirmed towards the very start of the "Head of Terms" that had been provided to the Claimant.

12. The email also recorded a start date of 1 April 2021 and a specified workplace. Various other terms that one might expect to find in a contractual agreement were laid down.

13. Accordingly, I find that this email records the agreement between the parties and constituted their employment contract, albeit the employment may have began slightly earlier than 1 April 2021, as found by Employment Judge Daley. I need not make any finding as to the precise date.

14. The terms were incomplete in the sense that they did not address annual leave, nor did they address, for instance, periods of notice. Those issues are in dispute and the written contract does not provide much assistance in determining those claims.

15. However, other clauses are very relevant to the claims for entitlement to a bonus and shares. Notably clause 6 is as follows:

> "KHC [the Respondent] offers you a 5% share of the company in lieu of your commitment and ongoing work in ensuring the smooth and commercially successful running of the company. The shares will be issued, pro rata, over a period of five years with an undertaking by you that if for any reason you leave the company or the business relationship between you, and the company is terminated, you agree to forfeit all your shares fully back to the company, without any financial or legal implications to the company".

16. Clause 9 is as follows:

> "You will take part in a bonus scheme of payment by the company to you, up to 5% of your annual agreed remuneration, after a successful and viable financial year, starting from year 2 of the start of trading of the company".

17. The Claimant did not actively pursue a claim for a bonus in accordance with clause 9 at the hearing.

18. As there are no express terms relating to annual leave and notice pay, I need to determine whether there were in fact any terms relating to these issues and what they were.

19. As to annual leave, I begin by finding that the Claimant was given a very high level of autonomy to establish and run the company. He was given very many tasks and duties, perhaps rather too many. The Claimant contends that the Respondent afforded him too great a responsibility for a single individual. I make no finding about this; it is not an issue I need to determine. However, it shows that the parties' evidence was consistent. The Claimant was effectively left to manage many parts of the business without much support or oversight. This is one of the reasons the Respondent submitted that it considered him a contractor rather than employee.

20. In line with this autonomy, the Director's evidence was that the Claimant's annual leave arrangements were unmonitored. The Claimant regularly informed the Director when he was going to be on leave (some emails demonstrate this, although it doesn't seem to have been an invariable and consistent practice). This is only to be expected to ensure the Director was aware the business was being managed in the Claimant's absence. However, there was no evidence the Claimant required the Director's consent or that she regularly responded, or recorded or queried the leave taken. In fact, when the relationship soured, the Director was expressly unaware of the amount of leave taken and had to ask the Claimant for that information (see p.98 of the bundle).

21. In practice, it appears to me that the Respondent was largely content for the Claimant to take leave when he chose to do so, so long as the business was being effectively run. This also suited the Claimant. It does not mean, however, that there was a contractual agreement to any set period of leave.

22. The principle of holiday pay is clear in statute, commonplace and well regulated. In the absence of any contrary agreement, if the parties had truly realised they were entering into an employment relationship, it is most likely they would have intended the statutory framework to govern the Claimant's paid annual leave entitlement. In any event, there is no good reason for me to find otherwise; in circumstances where legislation comprehensively addresses annual leave, it is the obvious starting point, and, in this case, the end point. Just because the Claimant may have taken considerably more leave during his first year of employment, and indeed had already taken in excess of 5.6 weeks' leave in his second year (points I will come on to), does not mean that there was any contractual entitlement to it. An employer can grant as much leave, paid or otherwise, to its employees as it wishes to, but is never required to go beyond its contractual agreement. If taking additional leave had become a regular and consistent occurrence, and the Respondent

had known and consented to that practice (expressly or by implication), the situation might be viewed differently. In this case, the Claimant had not yet completed 2 full years of employment. The Owner's uncontested evidence was that its profitable activity only genuinely began 5-6 months after it had been established, with its first patient only being taken into its care in November 2021. Prior to then, he admitted that limited work was required of the Claimant, so there was no reason at all to query any leave he was taking, even had the Respondent been minded to do so. It was in fact not minded to principally because it considered the Claimant to be self-employed and entitled to take leave whenever he chose. In my view, the best interpretation of the situation is that the Respondent permitted the Claimant to take additional paid leave pursuant to an *ad hoc* arrangement, but this was not sufficiently formalised to constitute a lasting variation of the parties' employment contract.

23. As to the amount of leave that the Claimant actually took, it was agreed at the hearing that the Claimant took seven and a half weeks of annual leave in his first year of employment to March 2022.

24. The amount of annual leave the Claimant took in his second leave year, March 2022 – 2023, was in dispute. I find as a fact the following:

    21.1 The Claimant took 7 days of annual leave between 10 May 2022 and 19 May 2022. This was agreed by the parties and is recorded in an email provided at page 84 of the bundle.

    21.2 I find, on the balance of probabilities, that he also took a week of leave in September 2022. The Claimant recorded as much himself in an email provided at page 87 of the bundle, which was sent only a few months later on 19 January 2023. The Claimant suggested at the hearing that he had not in fact taken any leave, but I place greater weight on the written and more contemporaneous record of what he wrote had happened. I find the Claimant's reference to a week's leave was to 5 working days.

    21.3 The Claimant also took 2 weeks of leave in November 2022. This was agreed between the parties to represent 10 working days and was referred to in an email at page 85 of the bundle.

    21.4 I find that the Claimant took a further 2 weeks of leave in December 2022. He refers to this in the email at page 87 of the bundle. In the statement the Claimant attached to his claim form, he suggested that he had been on leave for 3 weeks. However, for similar reasons to my finding as to the leave he took in September, I place greater weight on the Claimant's more contemporaneous written record.

25. Adding all of those periods together, I find that the Claimant took six weeks' worth of paid annual leave and two days, i.e. 32 days, or 6.4 weeks, in the leave year.

26. As to notice pay, for similar reasons there is no obvious reason to depart from the statutory provisions as laid down in s.86 of the Employment Rights Act 1996 (the "ERA"). Accordingly, the Claimant would normally have been entitled to one week's notice. That the Claimant chose to provide a longer

period of notice when he resigned does not indicate that the Respondent would have been obliged to do likewise.

27. The Claimant proffered his resignation on 29 January 2023, stating his "*final day with the company will be 15th March 2023*" (p.54 of the bundle). However, in the intervening period, at a handover meeting on 8 February 2023, the Claimant was summarily dismissed for gross misconduct.

28. There is much debate about what actually happened at that meeting and the parties' recollections differ markedly about what was said and what was done. What is clear to me is that at the conclusion of the meeting, the Claimant retained some company property including a company phone containing a directory of important contacts and some keys to the Respondent's premises, despite having been asked to return them. It is possible that he retained some other items of company equipment and failed to disclose computer access passwords, however I need not determine this.

29. In making this finding I placed greatest weight on an email from the Director of the same day, 8 February 2023, provided at p.102 of the bundle. The email confirmed the Claimant's dismissal and stated as follows:

> "At the meeting today, I asked you to hand over the keys of the company's office and any other company property in your possessions to the company, but you refused in front of witnesses. It is concerning that you did not follow the reasonable request from the company. Due to your not handing back the office keys of the office, we had to change the office locks and alerted the landlord of the building that you are not welcomed to our office in Golders Green or at 8 Yeats Close".

30. In an email dated 20 February 2023, the Claimant wrote to the Respondent to say that he had given "*all Kuklous Items including office keys, Yates Close keys in my possession to deliver to you since last week*". 20 February was a Monday, the previous week commencing on Monday 13 February, at least five days after the meeting on 8 February 2023.

31. Apart from these emails, I note that the Respondent states that it proceeded to employ a locksmith to change the locks and incurred expenditure on that. It also states that it incurred expenditure on an IT specialist to attempt to access the Respondent's computers, with costings of these services being given in the Respondent's counter schedule of loss.

32. As an indication of the breakdown in trust that had happened by the time the Director sent her email on 8 February, she also wrote:

> "If you still try to do so as you threatened entering the company office, it will be a criminal offence and we will pursue the prosecution with full force of the law".

33. Plainly, coming to write an email in those terms clearly demonstrates that what happened at the meeting on 8 February was a fairly heated discussion. That has also been borne out by my experience of the hearing today where the parties both agree that it was a confrontational meeting and they both retain quite severe grievances about each other's conduct in the run-up to and at that meeting.

Issues and Conclusions

Issue 1 – Wrongful Dismissal/Notice Pay

34. The parties put forward various positions before me. The Claimant sought pay for a month's notice, believing that to be a term of his employment contract. The Respondent's initial position was that only one weeks' notice had to be paid in accordance with s.86(1)(a) of the ERA. Its view was that that period ran from 29 January 2023, the date of the Claimant's resignation.

35. On this issue, I have found that the Claimant was entitled only to one week's notice.

36. However, in truth, this finding is of limited relevance. The Claimant had proffered his resignation with around 6 weeks' notice, which was accepted. Most importantly, the Claimant was summarily dismissed on 8 February, during his notice period. That was the effective date of termination of his employment contract.

37. The real issue is whether any notice pay was payable at all. If the Respondent was entitled to treat the Claimant's actions on 8 February as a repudiatory breach of the terms of his employment contract, notably the implied term of trust and confidence, it would have been entitled to treat the contract as terminated with immediate effect. No notice pay at all would be due (noting s.86(6) of the ERA).

38. As mentioned above, the content and nature of the meeting on 8 February is distinctly unclear. However, the thrust is that the parties' relationship had broken down. One important fact is that the Claimant failed to return sensitive company property, including a mobile phone and keys, on the Respondent's direct request and without reasonable excuse. Does this fact alone amount to a repudiatory breach of his employment contract? I find that it does. The Respondent is a company registered with the Care Quality Commission, holding considerable responsibilities in relation to very vulnerable adults. The Claimant was fully aware of this. The loss of important contact numbers, security of access to the Respondent's premises, and data security are very important matters to any company, but especially one like the Respondent. The Claimant's failure to comply with a straightforward and clear instruction relating to important company property is, in itself, a very serious matter and I accept that it amounts to a fundamental and repudiatory breach of the implied term of trust and confidence. The Respondent was entitled to act upon that breach immediately by terminating the Claimant's employment without notice.

39. Accordingly, the claim of wrongful dismissal/entitlement to notice pay is not well-founded and must be dismissed.

Issue 2 - Arrears of Pay

40. As to the next issue, in light of my finding about the notice period it is not truly in dispute. There was no dispute that the Claimant had been paid for the month of January and that he had been paid up until 8 February 2023. However, during the course of the hearing, the method of calculation of the

amount of pay due for February had been brought up. Although there might be several ways of calculating the appropriate amount due, the methodology put forward by the Respondent was that it divided the Claimant's regular monthly pay by 30 to achieve a daily rate, and then multiplied this rate by 8 days. I found that to be inappropriate in this case. It does not focus on working days, nor does it take account of the fact that February only consisted of 28 days.

41. An alternative method of calculation is to take the annual salary of £35,000, divide that by 52 to obtain a figure for a week's pay (£673.08), divide that by 5 which is the number of days worked each week (£134.62), and then multiply that daily rate by the 6 days worked in February (£807.69, allowing for rounding errors). The Respondent agreed with that methodology and the result was that £807.69 was due to the Claimant for February 2023. The difference between £807.69 due and £777.77 that had already been paid is £29.92 and that is the sum that I ordered the Respondent to pay to the Claimant on account of his pay for the period 1-8 February 2023.

42. To this very limited extent the claim to have suffered an unauthorised deduction from wages in accordance with Part II of the ERA is well-founded.

Issue 3 – Holiday Pay

43. As to the third issue before me, holiday pay, I have found that the Claimant was entitled to 5.6 weeks of leave in the year from March 2022. He had taken 6.4 weeks by the date of his dismissal, which was one month prior to his second anniversary in the role. The Respondent submitted that he had taken bank holidays off work in addition and been paid for those days. I don't need to make any findings on that point. Either way, he had exhausted his leave entitlement and was not due any further payment from the Respondent.

44. The claim for holiday pay is therefore not well-founded and is dismissed.

45. There might be an argument that the Claimant was "overpaid" for leave and accordingly that the overpayment could be recovered or set-off against the award for unpaid wages. However, I do not consider that appropriate. As mentioned above, there is a difference between the contractual entitlement to leave, and the fact that the Respondent permitted the Claimant to take leave in excess of his entitlement. I have found that the Respondent permitted the Claimant to take the leave he took and accepted to pay him for it. That was a separate agreement between the parties that is not in dispute. It is not for me to interfere with that agreement by applying any set-off, even though the amount of unpaid wages is relatively minimal.

Issue 4 – Other Contractual Entitlements

46. By the time of the hearing, the only real dispute was as to an alleged entitlement to shares. The Claimant did not actively pursue his claim to be entitled to a bonus in accordance with clause 9 of his contract. He was right not to do so in my view; the contract was clear that the clause only became operative after 2 financial years had elapsed, the second of which must have been profitable. The Claimant's employment did not last those 2 years.

47. The claim therefore was for an allocation of company shares allegedly due to

the Claimant in accordance with clause 6 of his contract. The Claimant contended that he should have been granted 5% of the shares of the company every year for the first five years of its operation. The Respondent's position was that the clause provided for a 5% share overall to be allocated to the Claimant at the rate of 1% per year, that being its understanding of the term "pro rata".

48. I have considered this issue by objectively analysing the wording of the clause in question. It seems to me entirely clear that the Respondent is correct; the overall offering was 5% of the company's shares to be allocated to the Claimant at a rate of 1% per year over the first five-year period. Accordingly, the Claimant would have been due 1% of the shares of the company after his first year of employment.

49. However, the matter does not stop there because the clause also states that the parties agree that if the Claimant were to leave the company, he would "*forfeit all [his] shares fully back to the company, without any financial or legal implications to the company*". Although the Claimant never in fact sought or received his shares, they would have been forfeited if he had. The Claimant has therefore suffered no financial loss. None was proven, and I accepted the Respondent's evidence that no dividends had been paid out during the period of the Claimant's employment (if ever).

50. Accordingly, these complaints are also not well-founded and must be dismissed.

Issue 5 - Failure to provide written statement of employment particulars

51. As to the final point in dispute, the Respondent failed to provide the Claimant with a written statement of employment particulars. Although some terms were made clear in writing, others required by s.1(4) of the ERA were not. The sanction for such a failure is to make an additional award (s.38 of the Employment Act 2002). However, s.38(5) provides a general exception to the rule where there are exceptional circumstances which would make an increase to the award unjust or inequitable.

52. In this case, the parties were clear about a number of the important terms and conditions of their employment relationship. They were recorded in writing in the "Head of Terms" emailed to the Claimant. The Claimant never seems to have sought, prior to this point, any further written particulars or details. He has directly benefitted from this rather informal arrangement by enjoying the flexibility and autonomy he was given, for instance by taking significant amounts of annual leave apparently with no restriction. I also note that s.38 of the Employment Act 2002 only applies in circumstances where a claim has been successfully brought. In this case, in theory it has been as the Claimant has received an award. However, in reality he has been awarded a minimal sum, far below what he was seeking, and I doubt the Claimant considers he has been successful in any real sense. Had the Respondent not made a minor and perfectly innocent error in calculating the Claimant's final instalment of wages, the claim would have been dismissed in its entirety. Taken together, I find these factors constitute exceptional circumstances that would make a further award both unjust and inequitable.

Employment Judge Hunt

Date: 19 June 2024

Judgment sent to the parties on

21/06/2024

For the Tribunal office

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