



EMPLOYMENT TRIBUNALS

Claimant: Mr J Moshweu
Respondent: Elysium Healthcare N° 2 Ltd
HEARD AT: Bedford ET **ON:** 10th February 2017
BEFORE: **Employment Judge Ord**

REPRESENTATION

For the Claimant: Ms D Aghaeze (Solicitor)
For the Respondents: Ms S Cowen (Counsel)

JUDGMENT

1. The Claimant having been unfairly dismissed, an order for reinstatement is made pursuant to section 114 of the Employment Rights Act 1996.
2. The Claimant shall be reinstated with effect from Monday 27 March 2017, subject only to the Claimant, by that date, obtaining satisfactory DBS clearance. In that regard the Respondent shall by 4pm Monday 13th February forward to the Claimant and his solicitors the appropriate URL or other website link, by email, to enable the Claimant to make his application for an up-to-date DBS clearance. Alternatively by 4pm Monday 13 February 2017 the Respondent will advise the Claimant whether the DBS clearance previously held in the Claimant's name is still current, its' expiry date and that there is no need for a further clearance process to be undertaken, in which case the Claimant's reinstatement will take effect from Monday 6 March 2017.
3. The Claimant is reinstated into his role as Healthcare Assistant working 37.5 hours per week at Chadwick Lodge. The Claimant is to be reinstated at his pre-dismissal rate of pay with full benefits as if he had

not been dismissed including by the application of any uplift increase or other change to his rate of pay and other benefits which have been put in place since 23 June 2015.

4. Within 7 days of the date upon which the Claimant is reinstated to his role as Healthcare Assistant, the Respondent will pay to the Claimant a sum equal to the earnings which he would reasonably be expected to have earned during the period since the date of his dismissal, including payments that would have been made by the employer to the Claimant on account of pensions and any other benefits. The precise sum is to be agreed between the parties by not later than 24 February 2017 and to assist in the calculation of the precise sum, which will then be incorporated into this Judgement, the Respondent will provide to the Claimant by not later than 4pm, 17 February 2017, details of any and all pay increases in pay and/or benefits to which the Claimant would have been entitled in his role as Healthcare Assistant in the period since the date of termination of his employment, namely 23 June 2015.
5. In the event that by 27 March 2017 the Claimant has not secured satisfactory DBS clearance (if required) then the date for reinstatement to commence will be deferred to a date 14 days after receipt by the Respondent of a satisfactory DBS clearance. In the event that no satisfactory clearance is obtained the order for reinstatement will be rescinded, an order for re-engagement would be inappropriate and the Claimant will be entitled to receive a basic award of £2205.30, a compensatory award of £15,894.24 and a payment for breach of his contract of employment in the sum of £1324.52, making a total sum payable by the Respondent to the Claimant of £19,424.06
6. The Respondent shall by not later than 4pm 24 February 2015 make payment on account to the Claimant of the sums due under either paragraph 4 above or paragraph 5 above the sum of £10,000 which shall be taken into account when the final payments due under either of those paragraphs is made.
7. The Respondent shall pay to the Claimant by not later than 4pm 24 February 2015, the sum of £1200.00 under rule 78 (1) (c) of The Employment Tribunal Rules of Procedure 2013 by way of reimbursement of the tribunal fees paid by the Claimant. The Claimant's application for costs of these proceedings generally is to be heard by me on 13 April 2017 in accordance with case management orders issued on 27 January 2017 and the cost order made in this paragraph shall not affect that general application for costs which application includes the cost of today.
8. The name of the Respondent is amended to Elysium Healthcare N^o2 Ltd without the need for further order or action.

REASONS

9. The Claimant was employed by the Respondent as a Healthcare Assistant from 5 July 2010 until 23 June 2015, when he was summarily dismissed for gross misconduct.
10. By a Judgement sent to the parties on 19 December 2016 the Claimant was found to have been unfairly dismissed. There was no conduct of the Claimant which was deemed to have contributed to his dismissal. The Claimant was also found to have been dismissed in breach of contract.
11. At today's remedy hearing the Claimant sought reinstatement, alternatively re-engagement.
12. I had evidence from the Claimant and from Teresa Wagstaff, Senior HR Business Partner for the Respondent.
13. There is currently a vacancy for a Healthcare Assistant working 37½ hours per week at Chadwick Lodge, which is the same as the post previously carried out by the Claimant, entirely satisfactory, for a period of just 11 days short of 5 years.
14. The ownership of the Respondent has changed since the Claimant was dismissed. It has also changed its name. It was previously known as Priory Secure Services Ltd it is now called Elysium Healthcare N^o2 Limited.
15. It is over 18 months since the Claimant was dismissed and in that time he has not secured any work. He is now aged 61 having been born on 19 April 1955. Prior to his employment with the Respondent, he had a number of years experience working in the healthcare industry.
16. The current advertisement for a Healthcare Assistant working at Chadwick Lodge indicates that no previous experience is necessary as basic training will be provided. Ms Wagstaff confirmed that that vacancy at Chadwick Lodge remained open.
17. The Respondent says and it is accepted that in order to work at Chadwick Lodge every employee must have suitable and current DBS clearance. In circumstances where a prospective employee has to obtain certification from only one police authority for the purpose of DBS clearance, Ms Wagstaff confirmed that a timescale of 4 weeks was appropriate, perhaps up to 6 weeks in order to obtain the necessary clearance. The Claimant had DBS clearance whilst working at the Respondent and clearance ordinarily lasts for 3 years without renewal. The Respondent could not say whether the Claimant's DBS

clearance, which he had prior to dismissal was still current. But if not he will have to obtain fresh DBS clearance.

18. The Respondent objected to the Claimant's application for reinstatement, and according to Ms Wagstaff's evidence in her witness statement. The reasons were as follows.

"He was dismissed some 18 months ago and by his own evidence he had not worked during that period, working with the type of patients at Chadwick Lodge (i.e. those detained under the Mental Health Act 1983). We are also concerned about the message that this would send internally to other employees."

19. In oral evidence Ms Wagstaff stated, and this was repeated by the Respondent's counsel in submissions, that that appeared to be a lack of reflective practice on the Claimant's behalf in that when he was asked whether, faced with the same circumstances as he faced on the day in question in the incident which led to his dismissal, he would do anything differently. He said that he would not. The Claimant, I repeat, was not found to be guilty of any conduct which contributed to his dismissal and further the Respondent did not establish for the purpose of the Claimant's breach of contract that he had in fact been asleep at the time. In the circumstances, it is the employer, based on the findings which I made and which are set out in the merits judgement , which needs to engage in reflective practice to ensure that suitable facilities are provided to enable an employee to enjoy the breaks to which he or she is entitled under the Working Time Regulations and further to ensure that staffing levels are maintained at an appropriate level throughout a shift and that obvious and gross shortages, such as those which were extant on 18 March 2015 do not recur and are rectified very promptly if they do re-occur through no fault of the Respondent but due to extenuating circumstances

20. Ms Wagstaff also said that the Respondent was concerned, "The message that [reinstatement of the Claimant] would send internally to other employees". When asked to explain this statement she said that she was concerned that other employees would consider that it was "acceptable to be asleep during a break or whilst at work." I have already stated, but repeat, that the Claimant was not found to have been asleep at work and whilst in a case of unfair dismissal I am not able to make any recommendations, it would be of assistance to the Respondent, given that it has recently come into the hands of new owners and given new management is in place, to consider in detail the findings which were made and which are set out in the merits Judgment as part of the reflection which they ought to engage in as a result of these proceedings

21. On behalf of the Claimant Mr Davey said that this was a perfect example of a case where reinstatement was appropriate. A job exactly the same as the Claimant's old job was available and being currently

advertised at the same location, the individual members of management involved in the Claimant's unfair dismissal were no longer in place and the post which was being advertised and which was still available required no previous experience as training would be provided (the Claimant, of course, having experience and this placing himself ahead of the other non-experienced applicants, if any). I agree and I cannot see any reason why reinstatement is either impractical or inappropriate in the circumstances of this case. It is often forgotten that the tribunal has a duty to consider reinstatement as the primary remedy and in case of unfair dismissal in the event that the Claimant seeks it.

22. Under section 116 of the Employment Rights Act 1996 when exercising the tribunal's discretion under section 113 (for either reinstatement or re-engagement in accordance with sections 114 and/or 115), the Tribunal must take into account whether the complainant wishes to be reinstated (he does); whether it is practicable for the employer to comply with an order for reinstatement (and there is no reason advanced which I consider to amount to evidence of impracticability) and whether the Claimant caused or contributed to some extent to the dismissal; finally whether it would be just to order his reinstatement. The Claimant did not contribute to his dismissal and I consider it is just to order his reinstatement. He gave almost 5 complete years of entirely satisfactory service to the Respondent until he was dismissed in circumstances which were unfair. It is entirely appropriate in the circumstances of this case to make an order for reinstatement.
23. The Respondent did not come to this hearing equipped with proper information regarding the rates of pay within its undertaking to enable proper calculation of the sums due to the Claimant to be made. However, prior to his dismissal the Claimant had a pre-tax basic monthly pay of £1213.00, according to his payslips, worked overtime from time to time and had the benefit of life insurance and pension contributions. Those figures come from the Claimant's application to the tribunal, the Respondent denied that they were accurate, but has provided no other figures. It would be inappropriate for the Respondent's failure to provide proper information to the Claimant and to the Tribunal to be a reason for not making an order given that an order for reinstatement must state the amount payable by the employer in respect of any benefit which the complainant might reasonably have expected to have but for dismissal including arrears of the period between the date of termination of employment and the date of reinstatement. Accordingly I have made orders requiring the Respondent to provide the necessary information to the Claimant, the parties to agree a calculation and payment on account to be made to the Claimant which can be deducted from either the sums due on reinstatement or - in the event that the Claimant is unable to obtain satisfactory DBS clearance - due by way of basic and compensatory awards and payment for breach of contract.

24. The Claimant has paid £1200.00 by way of Tribunal fees and the Respondent is ordered to repay those to the Claimant without prejudice to the wider application for costs which the Claimant has made which is due to be heard on 13 April 2017. In the event, which I trust will not occur, that there remains any outstanding issue between the parties in relation to this order that will be dealt with by me at the beginning of the hearing on 13th April.

Employment Judge Ord, Bedford

JUDGMENT SENT TO THE PARTIES ON

21 February 2017.....

.....
FOR THE SECRETARY TO THE TRIBUNALS