



EMPLOYMENT TRIBUNALS

Claimant: Mr S Glass

Respondent: TFS Buying Ltd

Heard at: Manchester

On: 22 May 2018

Before: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Mr D Leonard, Finance Director

WRITTEN REASONS

1. These are the written reasons for the judgment delivered orally with reasons at the conclusion of the hearing and sent out to the parties on 6 June 2018.

Introduction

2. By his claim form of 26 February 2018 the claimant brought a claim of breach of contract against the respondent arising out of the last few days of his employment. He was working out a notice period due to expire on 30 November, and should have been paid for the month on Friday 24 November 2017. When he was not paid he treated that as a repudiation of his contract and resigned with immediate effect. His complaint was that he had been constructively dismissed, and that as a consequence of the respondent's breach of contract he had been deprived of pay for his last four working days between 27 and 30 November 2017.

3. By its response form of 4 April 2018 the respondent defended the proceedings on the basis there had been no breach of the contract of employment, no constructive dismissal and therefore that the claimant was not entitled to be paid after 24 November 2017.

4. The issue for me to determine was whether the respondent had committed a fundamental breach of contract in failing to pay the claimant on 24 November 2017, and if so whether the claimant's resignation should be construed as a dismissal

leaving the respondent liable for breach of contract for the four remaining days of the notice period.

5. Both sides supplied documents for the Tribunal to consider. Mr Leonard had also prepared a witness statement. Although there were disputes about some background matters, there was no dispute about the relevant facts and at the outset of the hearing the parties agreed that the facts were as set out below. Accordingly it was not necessary for me to hear any oral evidence on oath or affirmation.

Relevant Legal Principles

6. Not every breach of contract by an employer is necessarily repudiatory. In **Frenkel Topping Limited v King** **UKEAT/0106/15/LA** 21 July 2015 the EAT chaired by Langstaff P put the matter this way (in paragraphs 14-15):

“14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was “conduct with which an employee could not be expected to put up”. In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.

15. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. Thus in Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 CA Sedley LJ observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach

7. The importance of pay in the employment relationship was also emphasised by the Court of Appeal in **Cantor Fitzgerald v Callaghan** [1999] IRLR 234. The Court said that it was difficult to exaggerate the crucial importance of pay in any contract of employment (paragraph 35), and quoted an observation of Browne-Wilkinson J, as he then was, in **R F Hill Ltd v Mooney** [1981] IRLR 258 that:

“The obligation on an employer to pay remuneration is one of the fundamental terms of a contract. In our view, if an employer seeks to alter that contractual obligation in a fundamental way, such as he has sought to do in this case, such attempt is a breach going to the very root of the contract and is necessarily repudiation.”

8. In paragraph 41 of **Callaghan** the Court said that:

“...the question whether non-payment of agreed wages, or interference by an employer with a salary package, is or is not fundamental to the continued existence of a contract of employment, depends on the critical distinction to be drawn between an employer’s failure to pay, or delay in pay, agreed remuneration, and his deliberate refusal to do so. Where the failure to delay constitutes a breach of contract, depending on the circumstances, this may represent no more than a temporary fault in the employer’s technology, an accounting error or simple mistake, or illness, or accident or unexpected events...If so, it would be open to the Court to conclude that the breach did not go to the root of the contract. On the other hand if the failure or delay in payment were repeated and persistent, perhaps also unexplained, the Court might be driven to conclude that the breach or breaches were indeed repudiatory.”

Agreed Facts

9. The written contract of employment signed by the claimant on 16 November 2015 required the claimant to give three months' notice of termination. Clause 4 said:

"You will be paid a salary at the rate of £40,000 per year (the "Basic Salary") which shall accrue from day to day and which shall be paid by equal monthly instalments on or before the last Friday of every month in arrears.

The Employer will reimburse you at the end of the month duly authorised expense claim forms presented by the 5th day of that month...."

10. The claimant resigned by letter of Tuesday 31 October 2017 giving one month's notice instead of the three required by the contract. His employment was due to end on Thursday 30 November 2017. His letter said that the company had shown a lack of trust in him and it was not in the interests of either party for him to work a three month notice period while having access to sensitive business and payroll information.

11. On Wednesday 22 November the claimant was informed verbally that he would not be paid as usual on Friday, but would be paid on his last working day in the following week.

12. On Friday 24 November 2017, the claimant sent an email noting with disappointment he had not been paid his salary for November. He asked for it to be resolved by a bank payment or cash in hand by close of business, failing which he would consider it a breach of his contract of employment. Mr Leonard responded by email at 4.20pm confirming that the claimant would be paid on 30 November 2017 instead. The email said this was due to the fact that the claimant was intending to breach his contract by leaving two months before his contractual leave date.

13. The claimant treated this as a breach of his contract of employment. He regarded the failure to pay his salary on 24 November as a repudiation of his contract and accepted that breach as bringing his employment to an end immediately. He did not work after 24 November 2017.

14. The claimant was paid for the period up to 24 November 2017. He claims payment for the four working days between 27 – 30 November 2017.

Submissions

15. Once the agreed facts had been established each side summarised its case for the Tribunal.

16. The claimant emphasised that he had received advice that a failure to pay him on time was a fundamental breach.

17. For the respondent Mr Leonard argued that the claimant would have known that practice on occasion was to pay members of staff on their last day of employment. Mr Singh, who accompanied Mr Leonard, pointed out that clause 4 of the contract went on to make clear that expenses could be paid on the last day of the month, and that the whole clause should be read as one. The respondent's position

was that there had been no fundamental breach of contract and therefore no constructive dismissal.

Conclusions

18. There were some matters which were not relevant to the determination of the issue before the Tribunal. They included the reasons why the claimant chose to resign at the end of October, and the impact on the respondent's business of a resignation on only a month's notice at the busiest time of the year. Instead I was more concerned with the contractual mechanics.

19. As the case law summarised above indicates, the term of the contract as to pay is a crucial term and very often a failure to pay in accordance with a contract will be a repudiatory breach. However, that is not an invariable rule, as the Court of Appeal recognised in **Callaghan**.

20. I rejected the argument raised by Mr Singh that clause 4 entitled the respondent to make payment after the last Friday of the month. In my judgment the clause clearly set up two different rules for salary and for expenses. There was no issue as to expenses in this case. Even if practice in the past had been to pay others on the last day of employment rather than the last Friday of the month, that fell short of overriding the clear express written term of the contract. The failure to pay the claimant on Friday 24 November 2017 was therefore a breach of contract.

21. Viewed objectively, however, it was not in my judgment a repudiatory breach. There were some unusual circumstances here.

22. Firstly, the claimant had himself breached his contract of employment by resigning on a month's notice rather than three months' notice.

23. Secondly, the failure to pay him on Friday 24 November did not come "out of the blue" but he had been informed about it a couple of days earlier.

24. Thirdly, it was not a decision to withhold payment entirely. It was just a delay.

25. Fourthly, the delay was for a short period of just less than a week.

26. Finally, an explanation had been given. The claimant had already shown he was leaving earlier than he should and there was a concern that if he received payment he might not attend work the following week. Whether that concern was well-founded or not, it provided a rational basis for withholding payment for a few days which was explained to the claimant at the time.

27. In those circumstances the failure to pay the claimant on Friday 24 November 2017 did not amount to a repudiation of the contract. Viewed objectively it showed that the respondent still intended to honour the contract, albeit delaying the final payment by almost a week.

28. In the absence of any repudiatory breach the claimant's decision to resign cannot be construed as a dismissal. It was his choice that the contract ended on Friday 24 November rather than Thursday 30 November 2017.

29. The claim that he lost payment for those days because of the respondent's breach of contract failed and was dismissed.

Employment Judge Franey

7 June 2018

REASONS SENT TO THE PARTIES ON

27 June 2018

FOR THE TRIBUNAL OFFICE