THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON**

BETWEEN:

Mr P Moyo **Claimant**

AND

PricewaterhouseCoopers LLP **Respondent**

ON: **11 and 12 January 2018**

Appearances:

For the Claimant: **In person**

For the Respondent: **Ms G Hicks, Counsel**

JUDGMENT

The Claimant's claim of wrongful dismissal fails and is dismissed.

Reasons

1. Mr Moyo, who is a Zimbabwean national, presented claims of breach of contract and unfair dismissal to the Tribunal on 3 November 2016. His employment with the Respondent began on 2 March 2015 and ended on 7 June 2016. His claim of unfair dismissal was struck out on 29 December 2016 on the basis that he did not have the requisite period of service for a claim of unfair dismissal as required by s108 Employment Rights Act 1996. His claim of wrongful dismissal proceeded and came before me, having been initially listed for hearing in February 2017 when there was unfortunately no judge available to hear it.

2. At the hearing Mr Moyo gave evidence on his own behalf and the Respondent called evidence from three witnesses, Mr Hermanson, who took the decision to dismiss the Claimant, Mr Merry, who is a manager at the Respondent's Human Capital team dealing with immigration matters and Ms Wood, who provided HR support during the process leading to dismissal. All of the witnesses had provided written statements. There was a bundle of relevant documents and legal materials of 366 pages and a separate bundle of authorities helpfully prepared by Ms Hicks.

3. The claim is one of breach of contract. Did the Respondent act in breach of the terms of the Claimant's contract of employment when it dismissed his summarily on 7 June 2016 and did not give him notice, or pay in lieu of notice, or any payment in respect of his annual bonus? As the claim concerns only contractual rights I am not concerned with the fairness and reasonableness of the procedure adopted by the Respondent or the reasonableness of its decision to dismiss the Claimant. The question I am dealing with is an objective one – was there a breach of contract by the Respondent, or was the Respondent, in terminating the contract as it did, accepting a breach of contract on the part of the Claimant?

4. The legal background to the case arises from s15 of the *Immigration, Nationality and Asylum Act 2006* which provides as follows:

> **15 Penalty**
>
> **(1) It is contrary to this section to employ an adult subject to immigration control if—**
>
> **(a) he has not been granted leave to enter or remain in the United Kingdom, or**
>
> **(b) his leave to enter or remain in the United Kingdom—**
>
> **(i) is invalid,**
>
> **(ii) has ceased to have effect (whether by reason of curtailment, revocation, cancellation, passage of time or otherwise), or**
>
> **(iii) is subject to a condition preventing him from accepting the employment.**
>
> **(2) The Secretary of State may give an employer who acts contrary to this section a notice requiring him to pay a penalty of a specified amount not exceeding the prescribed maximum.**
>
> **(3) An employer is excused from paying a penalty if he shows that he complied with any prescribed requirements in relation to the employment.**

and from the *Immigration (European Economic Area) Regulations 2006* which set out the conditions under which family members of EEA nationals who are not themselves EEA nationals, are entitled to live and work in the UK. I have not set out the detailed provisions of those regulations in this judgment as I was not required to determine whether or not the Claimant was legally entitled to work in the UK. That was not the issue in this case.

5. I was however satisfied that the Claimant, who is an intelligent and well educated man who presented his case clearly and cogently, understood the requirements of the legislation as it applied to him. He had also had advice from immigration lawyers throughout the relevant period.

6. The Claimant referred me to two recent cases dealing with scenarios in which an employee was dismissed in circumstances in which the employee was unable to demonstrate to the employer's satisfaction their entitlement to work in the UK (*Okuoimose v City Facilities Management UKEAT/0192/11/DA* and *Baker v Abellio UKEAT/0250/16/LA*). However in my view both of these cases are distinguishable from the Claimant's case both on their facts and because they were unfair dismissal cases and raised questions about the reasonableness of the employers' conduct and the reasons for the dismissals, that do not arise in this case.

7. I was also referred by Ms Hicks to two cases on breach of contract, *WE Cox Toner (International) Ltd v Crook [1981] IRLR 443* and *Williams v Leeds United Football Club [2015] IRLR 383 w*hich did raise issues that were relevant to the Claimant's case. *Cox* deals with the question of whether a party to the contract that does not immediately respond to a breach by the other party, but seeks to allow the other party to remedy the breach first, thereby waives its right to accept the breach. The case establishes that there is no waiver in those circumstances. *Williams* reaffirms the established principle that whether or not there has been a breach of contract is an objective question, separable from the question of the reasonableness of the employer's conduct.

8. The claim arose from the Respondent's decision to terminate the Claimant's employment summarily because he had failed to show to its satisfaction that he had the right to work in the UK. The Claimant's case was that he had in fact complied with the terms of the contract by firstly, explaining to the Respondent that he did in fact have the right to live and work in the UK by virtue of his marriage to an EEA national and secondly by providing the Respondent with documentation in support of this contention that was sufficient to prove his entitlement. Consequently, he argued, the Respondent had no basis on which to dismiss him summarily – he had always complied with the contract's terms.

9. The Respondent's response was that it was the Claimant who was in breach of contract, by failing to provide satisfactory evidence of his right to work in the UK despite numerous requests for him to do so. The Respondent characterised that failure in two ways: firstly as a breach of a condition of the Claimant's continued employment, which as a matter of contract law would therefore discharge the Respondent from further performance of the contract and secondly as an act of gross misconduct on the part of the Claimant in that it both represented a failure to comply with the Respondent's policy of requiring its employees to provide evidence of their right to work in the UK and also had the potential to bring the Respondent into disrepute.

10. The legal question for me in this case therefore broke down into three parts:

    a. Did the Respondent establish that the contractual obligations it relied on formed part of the Claimant's contract of employment?
    b. Did the Claimant breach those terms?
    c. Was the nature of the breach such that the Respondent was entitled to rely on it to bring the contract to an immediate end without notice or pay in lieu of notice?

11. On the first of these points, I do not believe that the parties were actually in dispute as to the terms on the contract, but for completeness I will set out the relevant terms, which are in section 1.1 of the Respondent's Employment Manual (page 61) (and are substantially repeated in the offer letter of 17 November 2014 (page 52) and state as follows:

> **"Your employment with us in the United Kingdom is conditional upon your providing evidence that you are eligible to work in the UK. If you require permission to work in the UK (for example, your right to work in the UK is dependent on your own or a spouse's Certificate of Sponsorship or visa) then it is essential that you note the following points:**
> - **You will be responsible for having and maintaining permission to work in the UK and your continuing employment is subject at all times to your possessing permission to work in the UK…. Your employment will cease in the event that your permission to work in the UK is no longer valid".**

12. It is clear from these terms that the Claimant was contractually obliged not only to be entitled to work in the UK under current UK immigration rules, but also to provide evidence to the Respondent of that entitlement. In pleading his case the Claimant focused on his ability to comply with the first requirement but he appeared to underestimate the importance of the second. But I am satisfied that the requirement to actually provide evidence of entitlement was a specific and separate contractual obligation by virtue of section 1.1 of the Employment Manual, which, as the Claimant accepted in cross examination, formed part of the terms and conditions of his employment. The provision of satisfactory evidence was a condition of the contract. I find therefore that the Respondent has shown the existence of the contractual term on whose breach it relied in dismissing the Claimant.

13. The second question is whether the Claimant was actually in breach of this term. When he was first recruited he had a valid EEA residence card, but this expired on 2 December 2015. The chronology of the events that followed was explored during cross examination and is set out in the documents. Ms Hicks summarised it in her skeleton argument. Once the Claimant's own EEA Residence Card expired, the Claimant appears to have proceeded initially on the assumption that it was sufficient to inform the Respondent that there was no issue as to his entitlement as he could rely on the fact that he was still married to an EEA national to establish his own right to work (the Claimant was at that point separated from his wife, but still legally married). He did not appear to recognise that the Respondent was at any time entitled to ask him to provide one of the documents in List A to the Immigration (Restrictions on Employment) Order 2007, which is also reproduced in Annex A to the Home

Office Guide. He never at any stage produced one of those documents and the case could be said to turn on that simple fact.

14. However as the terms of the contract do not make specific reference to List A and because the Respondent did not explicitly ask the Claimant for one of those documents, but instead engaged in a discussion with the Claimant as to whether he could establish an entitlement via his then wife, I will go on to consider the evidence that the Claimant did put forward during that discussion and whether this established his entitlement in the way that he suggested. Once the Claimant's residence card had expired on 2 December 2015 correspondence between the parties continued until 29 April 2016 without the Claimant providing any documentation at all. In that four month period the Respondent repeatedly chased for an update as to whether the Claimant or his solicitors had submitted an application to the Home Office and the nature of any application made. The Claimant initially intimated in December 2015 that he was about to qualify for British Citizenship and would be making an application on that basis. He continued to state that his existing visa would remain valid until his divorce was finalised. The Respondent chased up on 17 February 2016 and was informed that the application "was being processed". The Respondent sought clarification that the application had been submitted and the Claimant did not reply until 3 March when on being chased again he confirmed that he had not yet made an application to the Home Office. The Respondent chased again on 16 March and 14 April, when for the first time it referred to its own obligations as an employer. Four days later it asked the Claimant for assurances from his lawyers that he could continue to work. The Claimant replied on 25 April to say that he had still not applied to the Home Office, but his lawyers were satisfied that he had the right to work. On being chased again he confirmed on 29 April that his lawyers would not give that confirmation in writing, but that he would then provide written documentation by the following Tuesday. Nothing was received and the Respondent chased on 3 May, warning that the Claimant's employment was at risk and again on 4 May, whereupon the Claimant provided the documentation listed at page 132, which was forwarded to the Respondent's immigration department. That department commented on the documents in an email at page 128-9.

15. A meeting took place with the Claimant on 16 May. A letter followed (page 173) setting out the Respondent's concerns. The Respondent did not seek to terminate the employment relationship at this stage and did not refer to List A. Instead it engaged with the Claimant's argument that he was entitled to live and work in the UK because of his wife's status as an EEA national (he was still legally married at that stage). It explained that it needed further evidence from the Claimant as to his wife's whereabouts and whether she was exercising treaty rights and needed to reflect further on the position taken by the Claimant's solicitors, which seemed to differ from its own understanding of the law. The Claimant was suspended on full pay pending these matters. The Claimant did not produce any further documents by the deadline of 20 May and he was invited to a further meeting on 2 June to discuss the position. Mr Hermanson conducted the meeting, took advice from the Respondent's lawyers following the meeting and dismissed the Claimant with immediate effect by letter of 7 June (page 177) for failing to provide evidence that

satisfied the Respondent of his right to work in the UK. He appealed and his appeal was dismissed by letter of 15 July 2016.

16. The relevant question for the purposes of this aspect of the breach of contract claim is whether the documentation produced by the Claimant on 16 May and 2 June, established his right to work in the UK. The Respondent concluded that it did not, having approached the matter from the perspective of whether the Claimant had established that his wife had exercised treaty rights in a five period ending no later than December 2013 (at which point the Claimant and his wife had separated) and on which basis the Claimant would have acquired a spouse entitlement. In my judgment the documents produced by the Claimant clearly did not establish the Claimant's entitlement. The Respondent's analysis of the position is set out in the dismissal outcome letter and in the response produced to the Claimant's appeal application (page 181). In essence the Claimant's argument failed because the documents relied upon left unexplained gaps in his wife's exercise of her treaty rights and there were several periods of time wholly unaccounted for, including, crucially, the period September 2007 to October 2009 and the period November 2009 to August 2011. In my judgment the Respondent was also entitled to treat a confirmation letter provided by the University of Westminster as evidence only that the Claimant's wife had enrolled for a one month period ending in November 2009. At its highest the letter suggested that the Claimant's wife might have enrolled for the whole academic year, but it clearly did not amount to evidence that she was enrolled for a four year course of which the year commencing in October 2009 was the last. I need not enumerate all points the Respondent relied on as set out at pages 181 -182, but its analysis was cogent. I find that the Respondent was entitled to regard the evidence provided by the Claimant as unsatisfactory and insufficient to establish his right to work in the UK on the basis of his wife's status as an EEA national who was exercising treaty rights throughout the relevant period.

17. I will make three more short points on this aspect of the analysis. Firstly, the Claimant complained that the Respondent did not tell him in terms what evidence he was required to produce. If this had been a claim of unfair dismissal, that might have been a relevant consideration, but it seems to me not relevant when the case is concerned with whether there has been contractual compliance by the Claimant. Secondly I would also observe in passing that in the section of the Claimant's offer letter (page 52) that deals with eligibility to work in the UK, there is a line that reads "Please see Embark – Statement of Eligibility which details the evidence required". However as the Respondent did not rely on that I will say no more about it. My third point relates to the Claimant's assertion that the Respondent could at any time have contacted the UKVI to ascertain his position. Mr Merry gave evidence, which I accept, that this was not the case as there was no actual application from the Claimant on which such an enquiry could have been based. But even if Mr Merry had been mistaken about that, the Respondent was under no contractual obligation to make such an enquiry and its failure to do so is irrelevant to the question of whether the Claimant had complied with the terms of his contract. Again that is a matter that might have been relevant if the claim had been one of unfair dismissal, but it has no relevance to this breach

of contract claim, which depends on an objective analysis of the terms of the contract and whether as a matter of fact the Claimant had complied with them.

18. As to the third part of the argument, I am also satisfied that it is clear from the terms of the contract that the requirement on the Claimant to provide evidence of his entitlement to work in the UK was a condition of his employment and that if the condition were not at any time satisfied the Respondent would be discharged from further performance of the contract. It was also the Respondent's case that the requirement to produce documentary evidence of the right to work was a fundamental term of the contract and that failing to do so would amount to gross misconduct, both on the basis that it represented a breach of the Respondent's policy on the right to work and that had the potential to bring the Respondent into disrepute – the Claimant conceded in cross examination that that was a possible consequence of the Respondent being found to be in breach of the immigration rules and s 15 of IANA 2006.

19. I hesitated before agreeing with the Respondent's submission on this point and there is some doubt in my mind that failing to produce the necessary documents would in all cases constitute gross misconduct. In this case however, there was non-compliance by the Claimant over a period of several months, and a number of occasions on which, having agreed to update the Respondent as to the position, he failed to do so. The Claimant also changed position, for example by having first indicated that he was going to apply for same day indefinite leave to remain status, then stating that he was going to apply for British citizenship, but then abandoning that course of action without explaining the position to the Respondent. None of the Respondent's witnesses expressed any doubts as to the Claimant's honesty. However it was clear from the Claimant's evidence that he did not acknowledge the extent to which the onus was on him to prove his entitlement. There did not seem to me to be a deliberate intention on the Claimant's part to avoid compliance, although some of the delays and failures to update the Respondent could reasonably be seen as appearing to be evasive. Overall, in my judgment, the Claimant's ongoing and cumulative failure to comply with the Respondent's requirements, did amount to a fundamental breach on the facts of this case, but even if I am wrong about that, this part of the Respondent's defence succeeds on the basis that the Claimant failed to comply with a condition of his contract by failing to produce the required documentation.

20. I also considered whether the considerable tolerance shown by the Respondent over this period amounted to a waiver of this condition or of its right to assert that the conduct amounted to gross misconduct and a repudiatory breach of contract. But having taken into consideration the *Cox* case and the undisputed fact that the Respondent asked the Claimant for the relevant documents and an update on the position numerous times between December 2015 and his dismissal in June 2016, I conclude that the Respondent did not waive its right on these facts. Its willingness to give the Claimant the benefit of the doubt was always in my view, qualified by clear statements to the effect that it required information as to the Claimant's immigration status. It never, in my view, gave the Claimant cause to think that

it intended to waive its entitlement to receive satisfactory evidence that he had the legal right to work in the UK. On the contrary, it made it clear that this was an ongoing concern and needed to be resolved.

21. It follows from these conclusions that the Claimant's claim of wrongful dismissal fails on the facts. For completeness I confirm that had I found in his favour on the wrongful dismissal claim I would not have accepted his claim for a bonus as the contractual terms are clear that entitlement to a bonus is lost if an employee is under notice of termination of employment during the relevant period.

22. The Respondent made an application for costs after I had delivered my oral judgment on the basis that the Claimant's claim had had little prospect of success and on the basis that he acted unreasonably in pursuing his claim to a hearing after the Respondent had made an offer to settle of the whole of the amount of the claim.

23. I declined to make an award of costs. Although with the benefit of hindsight it may appear that the Claimant's claim was unlikely to succeed, there was a degree of complexity in this case arising from the conjunction of immigration legislation and contract law. The Claimant has now established that he has the right to work in the UK and it seems to me that it was not unreasonable on the facts for him seek to have his claim that he had produced sufficient documentary evidence of his entitlement to work in the UK adjudicated independently of the Respondent.

24. The Claimant also explained that the offer to settle the claim had been conditional on his entering into a settlement agreement that contained terms that would have prevented his pursuing a separate claim of defamation. I did not consider that it was unreasonable of him to decline to settle the claim in that context. I therefore declined to exercise my discretion to award costs in this case.

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Employment Judge Morton

Date: 18 January 2018