EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Salter**

Respondent: **Neales Financial Management Limited**

Heard at: **Bristol** **On:** **17 January 2019**

Before: **Employment Judge O'Rourke**

Representation
Claimant: **Mr S Mackie, Solicitor**
Respondent: **Mr G Ridgway, Consultant**

JUDGMENT having been sent to the parties on 29 January 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal's Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and Issues

1. The Claimant was employed as a PA/administrator by the Respondent for approximately twelve years, until her resignation with effect 15 May 2018. As a consequence, she brings claims of constructive unfair dismissal, breach of contract in respect of notice and arrears of pay and holiday pay.

2. The Respondent is a small company, with two directors and until she resigned, the Claimant was their only employee. The Respondent provides financial advice.

3. The issues are as follows:

   (1) Constructive unfair dismissal. Did the Claimant resign because of an act or omission of the Respondent? The Claimant stated that she resigned because the Respondent ceased to pay her after 31 March 2018, which she became aware of on her next pay date, of 23 April 2018. The Respondent does not dispute that the Claimant's pay ceased with effect from 1 April 2018, but contends that as the Claimant was absent from work and not on sick leave or holiday, she was not entitled to be paid. The Respondent also contends that such absence was preceded by a

prior period of paid leave of almost three months, stemming from a 'without prejudice' discussion on 10 January 2018. The Respondent also contends that the Claimant was informed that her paid leave would cease on 31 March 2018. Is any such act or omission a fundamental breach of contract? Clearly, a unilateral deduction or cessation of pay, without a contractual right to do so, will nearly always amount to a fundamental breach of contract.

(2) Did the Claimant affirm the contract? In this respect, the Respondent relies on the three-week delay between the Claimant being aware she was not being paid, to her resignation.

(3) If the Claimant was unfairly dismissed, was the dismissal otherwise potentially fair and in this respect the Respondent refers to capability issues and potential redundancy? Did the Respondent otherwise act reasonably?

(4) Arguments as to **Polkey** and/or contributory conduct were not pleaded by the Respondent, but, in any event, as it transpired, there was very little evidence to support either contention.

4. The Claimant claims for arrears of wages and holiday paid, dependant on the Tribunal finding that the Claimant's employment continued till 15 May 2018 and that she continued to be contractually entitled to payment. The claim of breach of contract in respect of pay in lieu of notice depends on any finding of unfair dismissal.

5. Preliminary Issue: The Respondent sought to adduce in evidence the unredacted element of an email of their advisors, to the Claimant's solicitors, dated 13 April 2018 and marked "*without prejudice subject to agreement*". The Claimant objected to such request, on the basis that the entire contents of the email were protected by litigation privilege and elements of it could not therefore be filleted out. The representatives referred me to the case of **Portnykh v Nomura International plc [2014] UKEAT IRLR 251**, as to possible exceptions to that principle.

6. It is clear that this email was sent between legal representatives, in respect of a dispute between employer and employee and which both sides must reasonably have contemplated at least had the possibility of litigation. Accordingly, therefore, it is, under normal circumstances, privileged and such privilege cannot be waived without the agreement of both parties.

7. The entire email is, I find, covered by such privilege, as there is no indication that the author intended anything but that to be the case. As pointed out by Mr Mackie and with which I concur, the correct approach, if some element of the communication was to be 'open', would have been for a separate 'open' email to be sent. containing that information.

8. Exceptions to that principle are, as the case of **Portnykh** indicates, set at a very high threshold, such as where some overriding principle of justice applies, for example privilege "*acting as a cloak for perjury, blackmail or other unambiguous impropriety*" (paragraph 18).

9. I see no such principle in this case and it is merely, as described in **Portnykh** that one party considers themselves "*to suffer a forensic disadvantage*" in presenting its evidence. That does not, however, I find, render the relevant email admissible in evidence.

10. In any event, however, having heard the balance of the evidence, I don't consider that the point to which this preliminary issue goes, i.e. whether or not the Claimant was aware prior to 23 April 2018 that she would not be paid, to be particularly significant.

The Law

11. The well known case of **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 EWCA**, sets out the test for constructive unfair dismissal and which has been itemised already by me, when I set out the issues above.

12. It is trite law that unilateral reduction or deduction in pay is a fundamental breach of contract, as indicated by the case of **Industrial Rubber Products v Gillon [1977] UKEAT IRLR 389**, which also indicated that as the test is purely contractual, it is no defence for an employer to argue that it acted *bona fide* and with good intentions, or had "*reasonable and proper cause*" or had "*good reasons*". Either the employer was contractually entitled to withhold the pay, or it was not.

The Facts

13. I heard evidence from the Claimant and on behalf of the Respondent, from Mr Jonathan Gamlin, a Director.

14. I heard evidence from both witnesses as to workloads in the Company's office, the inputting of client data, file maintenance and the efficacy or otherwise of the Respondent's IT system and the Claimant's ability to access it. The Claimant considered that she had a high workload, not assisted, she said, by poor management from Mr Gamlin and also restricted access to the IT system, as she did not have her own password, needing to use Mr Gamlin's, which frequently changed. Mr Gamlin accepted that the IT system was not the best and agreed that there was only one often-changing password, for the one licence the Company held. However, he said there had previously been two licences, but however, as the Claimant when she had her own password, did not in fact input much data, he saw no point in paying for a second. He said, in his statement that the Claimant did not wish to assist in setting up the new IT system and that her administration work was "*becoming less satisfactory*". He said "*filing was not completed going back to 2013 and any ongoing issues had not been completed*". He was "*at a loss as to what she was doing everyday*". He mentioned a meeting in July 2017, at which "*some changes were agreed, to include the Claimant inputting more data and sending him a daily update email*" but he considered that she did not comply with those requests. The Claimant said, in turn that she was working as hard as she could and blamed Mr Gamlin, as previously stated, for poor communication, poor file management and her restricted access to the IT system.

15. A catch-up meeting was arranged six months later, following the Christmas break, for 2 January 2018. Mr Gamlin was also concerned that the Claimant had taken unauthorised leave prior to Christmas, at a time just after an office move, which was he considered an inconvenient time to do so.

16. In cross-examination, Mr Gamlin said that this meeting was intended to be a constructive one, at which he wished to discuss a plan to have him and the Claimant work together in a more "*joined-up fashion*". He said he needed to appoint somebody else to input data and considered that the Claimant should focus more on generating, or working on, leads, as she was good at it.

17. However, the meeting did not turn out to be constructive. Mr Gamlin said he didn't get a chance to discuss this plan with the Claimant, as she became upset when he raised the issue of the alleged unauthorised leave. The Claimant said he was "*incensed*" about it. The meeting, Mr Gamlin said, became "*heated*" and this lead to a confrontation, with the Claimant asking if she was being disciplined and then asking (Mr Gamlin said '*repeatedly*'), if she was suspended. He said he felt "*pushed into a corner*" by the Claimant's insistence on this point, feeling that she was "*goading*" him. He therefore did, at that point, suspend her. He said he thought that the Claimant "*seemed so offended that I didn't think we could work together just at that point*" and he "*needed to take a step back and think*".

18. The meeting ended and the Claimant went home. Later that day, Mr Gamlin emailed her [35], to say that she wasn't in fact suspended, as he had said that in error but instead was "*currently on leave from work at full pay for the next five days*" (effectively garden leave (although that term was not used), not affecting her holiday entitlement). In cross-examination, he denied that the Claimant's job was at risk, at that point, or at any point.

19. However, subsequently, he said "*on reflection and as the Claimant had said she thought it difficult to work with me*", he should offer her a settlement agreement to terminate her employment on agreed terms.

20. A draft agreement was sent to her and she rejected that agreement about four or five weeks later. He responded to that rejection, but he wasn't sure when. During this time and continuing, the Claimant remained on paid 'garden leave'.

21. Mr Gamlin said he was becoming increasingly frustrated with the delay in reaching settlement, but took no action to rescind the 'garden leave', as he nonetheless hoped a resolution would be reached.

22. However, by the end of March or thereabouts, his patience was at an end and he decided to stop the Claimant's pay, with effect 31 March. He said he did this as "*an attempt to focus minds on reaching a resolution*". He accepted however, in cross-examination that such a step was clearly intended to "*focus*" the Claimant's mind.

23. He agreed that he could have withdrawn the settlement offer and he also agreed that he never wrote to her, to tell her to return to work.

24. When asked why, if he had paid her for January – March, he decided not to pay her for April, he said it was "*because she was at home doing no work*". When challenged as to how that situation had changed from the January – March period, he said that he thought at that point that she was engaging in a settlement process (with the implication that by April she was no longer doing so).

25. The Claimant was asked in cross-examination why she resigned and said it was because her pay had been stopped, as set out in her resignation letter [41]. She said she saw no point in bringing a grievance, as it "*wouldn't have got anywhere*" and pointed out, as agreed by Mr Gamlin that there was no written grievance procedure, in any event. Nor did she see it as "*prudent*" to discuss the issue with Mr Gamlin, before resigning, as the only option being offered to her was an unacceptable settlement agreement and therefore "*it was the end of the line*".

26. She was further challenged as to her decision to resign, initially agreeing that even if the Respondent had continued to pay her, she might have resigned in due course, in any event, "*at some point*". When asked to clarify this point, she said that "*it was not a scenario I had thought about*" and she looked visibly confused, also referring to awaiting her P45. In re-examination, she confirmed the contents of her letter of resignation and the reasons set out in that letter.

27. The Claimant was also challenged as to the time taken from 25 April, to her resignation on 15 May and said that she needed to take legal advice as to the best "*juncture to resign*". She was unable to see her solicitor for two weeks and was also awaiting her P45, which never arrived.

Findings

28. Constructive unfair dismissal

(1) Did the Claimant resign because of an act or omission of the Respondent? While the claimant's evidence was momentarily confused on that point, I am confident that the trigger was the non-payment of wages in April. While the Claimant may have considered that her 'garden leave' situation could not continue for ever, there is no reason to assume that had her pay not been stopped, she wouldn't have been content, for obvious reasons, to have continued with that arrangement. I considered that at this point in questioning she became flustered and somewhat confused, but was not seeking to mislead the Tribunal and doing her best to answer rather hypothetical questions. Her resignation letter is crystal-clear on this point. The reference to her P45 can easily be explained by the possibility that she may have considered it feasible that the Respondent was in fact dismissing her and she was awaiting confirmation of that issue, before deciding whether to resign or not.

(2) Was any such act or omission a fundamental breach of contract? As should be clear from my reference to the law on this point and the case of **Industrial Rubber Products**, unilaterally withholding pay, without contractual entitlement to do so and regardless of any perceived "*proper*

cause" or "*good reasons*" on the Respondent's part, is a fundamental breach of contract. The only term in the Claimant's contract of employment, in relation to pay, is the express term set out in her offer of employment letter [25] and it is that her salary will be (at the time in 2006) £18,500 per annum "*paid by cheque one month in arrears on the 23rd of the month*". There is no contractual clause permitting deduction from or withholding of those wages. The test being purely contractual, whether or not the Respondent considered it was reasonable to expect them to continue to pay the Claimant whilst on garden leave, is irrelevant. Mr Gamlin had it in his hands to terminate this arrangement, by either making an offer that was acceptable to the Claimant, or instead requiring her to return to work, but he did neither. Instead, he unilaterally withheld the Claimant's wages, to "*focus her mind*" and to pressurise her into accepting the existing agreement offer. Similarly, as the test is purely contractual, there is no requirement on the Claimant to bring a grievance before resigning and in any event, I accept her evidence that in the context of an ongoing and prolonged settlement negotiation, it would have been pointless for her to do so.

(3) Did the Claimant affirm the breach? As the Claimant was on 'garden leave' and not instructed to return to work, there was no 'action' of hers that could have affirmed the breach. I don't consider that a three-week delay in resigning constituted affirmation of the contract. It is a very serious decision to resign, particularly for somebody in her later years and who was a long-serving employee and for which professional advice would be entirely appropriate. I have no reason to doubt her evidence that it took two weeks to see her solicitor and I accept also that her uncertainty about being sent her P45, due to any potential dismissal by the Respondent, may have contributed to such delay. The Claimant was therefore constructively unfairly dismissed.

29. I turn next to consideration therefore as to whether there was a potentially fair reason for dismissal. Mr Gamlin said, categorically, in evidence that the Claimant's job was not at risk and that in the January meeting he was intent on her continued employment, playing to her strengths and having him and her working better together. His oral evidence somewhat contradicted his witness statement and the grounds of resistance, in that while those documents asserted long-term capability issues, these did not, on his own evidence, seem to feature prominently, or at all, at the January meeting. The only real focus of criticism was the alleged unauthorised leave. None of the alleged capability issues had been documented at any point, in any form, such as an email, or meeting minutes and therefore they cannot have been serious considerations. I cannot conclude therefore that there is anything like sufficient evidence to consider that capability could be a potentially fair reason for dismissal.

30. The possibility of redundancy was also raised in closing submissions and whilst Mr Gamlin stated that nobody had been recruited to replace the Claimant, he did say that various self-employed persons had been engaged to input data. In any event, however, no corroborative evidence was provided as to this assertion. It was not pleaded or mentioned in Mr Gamlin's witness statement and the Claimant was not questioned in respect of it. I conclude therefore that there is little or no evidence to support the

assertion as to the Claimant's potentially fair dismissal on redundancy grounds, in due course.

31. There being no potentially fair reason for dismissal, **Polkey**, relating as it does to failure to follow procedure, cannot apply. In terms of contributory conduct of the Claimant there is simply no evidence to attribute "blameworthy conduct" to her (as set out in the case of **Nelson v BBC [1980] ICR 110 EWCA**). She simply rejected an offer of settlement and waited at home, receiving the pay the Respondent had agreed to pay her, until the Respondent decided to resolve the situation otherwise. That is not contributory conduct on her part.

Conclusions

32. For these reasons, therefore, I find that the Respondent constructively unfairly dismissed the Claimant.

33. I also find that her employment and entitlement to pay and other benefits continued until her resignation on 15 May and accordingly that the Respondent made unlawful deduction from wages and holiday pay for the period 1 April – 15 May. (Those sums were discussed with both representatives, were agreed and are set out in the remedy schedule attached to the Judgment.)

34. As the Claimant was unfairly dismissed, without notice, she is entitled to pay in lieu of that notice.

REMEDY

35. There are only three issues upon which I need to decide. Firstly, the extent of the claimant's efforts at mitigating her loss. Secondly, the level of compensatory award to be made in respect of loss of earnings. Finally, whether or not Section 124A of the Employment Rights Act 1996 applies to any such award, either in respect of uplift or reduction accordingly, as contended by both representatives.

36. Mitigation. If I consider that somebody with the Claimant's considerable experience in recruitment, particularly having specialised in rural/small-town office recruitment and with her extensive CV, cannot get a job in an area in relatively close commuting distance from her home in a rural area, then I suspect anybody else would find it very difficult to do so. Nonetheless, her drive to find work and her expectation that she will do so is admirable. I entirely accepted her evidence that she is on '*the live to work'* end, as opposed to '*the work to live'* end of that spectrum. She clearly and obviously wants and needs to work and is best placed to find such work without the "assistance" of faceless and computer-driven recruitment agencies. It is an adage (but adages are such because they often contain an element of truth) that the '*best jobs are never advertised'*, which many people, including the Claimant, consider to be true. Having complimented her on her expectation that she will find work, it is a sad fact that many employers, when confronted with a lady in her mid-60s, using a stick, will look elsewhere and for all we know that may have been a factor already

against her finding work. She has also, of course, actually mitigated her loss and given credit for those earnings from employment with her brother's firm. I accept therefore her claim to seek loss of earnings, which she has limited to the date of this Hearing, less sums earned in mitigation. (The calculation of that figure was then discussed with both representatives and figures agreed, as set out in the remedy schedule attached to the Judgment.)

37. ACAS Uplift/Reduction. As to the issue of ACAS uplift/reduction, simply put, there is no requirement in a constructive unfair dismissal claim to bring a grievance against the employer before resigning. I am unaware of any legal precedent as to the application of that policy to a constructive unfair dismissal claim (and I was not referred to any) and in any event, a fatal flaw for the Respondent is that there was no operative written grievance procedure for the Claimant to follow, had she been minded to do so.

38. While it might be argued that the Claimant could have "had a word" with Mr Gamlin, before resigning, perhaps she could have, but the s.124A reduction applies to the requirement to follow the ACAS Code on grievances, not to potential discussions outside that Code.

39. Turning then to the application for an uplift in the award: clearly, Mr Gamlin's attempt to "*focus the Claimant's mind*", by stopping her salary, was undue pressure on his behalf, but I balance that pressure with his behaviour for the three previous months, for which he allowed the Claimant to remain at home on full pay, during which, as far as the evidence goes, no pressure was applied to her. I consider, therefore, applying the 'just and equitable' discretion given to me under s.207A(2) of the TULR(C) Act 1992 that it would not be appropriate to make an uplift in this case.

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Employment Judge O'Rourke

Date: 18 February 2019