



EMPLOYMENT TRIBUNALS

Claimant: Mr A Busby

Respondent: Xenforo Limited

RESERVED JUDGMENT

Heard at: Reading **On:** 31 May 2019

Before: Employment Judge KJ Palmer

Appearances:

For the Claimant: Mr R O'Dair (Counsel)
For the Respondent: Mr D Stewart (Counsel)

JUDGMENT

It is the Judgment of this Tribunal that the Claimant's claim for unfair dismissal fails and is dismissed.

REASONS

- (1) The Claimant was employed as a business manager by the Respondent between 1 June 2010 and 7 June 2018 when he was dismissed summarily purportedly for gross misconduct. Throughout that time he was employed as a business manager. He was also a statutory director and remains a 20% shareholder in the company.
- (2) The Company is a small company operating ostensibly through the internet. It is a software development company. There are two other directors, Kier Darby and Mike Sullivan, both are also 40% shareholders in the Company.
- (3) The Company launched in June 2010. Prior to that Kier Darby and the Claimant were known to each other. In fact they had known each other since the early 1990s. The Claimant was also married to Mr Darby's late mother.

- (4) There is clearly a history of a fairly bitter family dispute in that pursuant to the unfortunate death of Mr Darby's mother in April 2013 Mr Darby was less than happy about how the Claimant had handled her estate.
- (5) I do not propose to go into the detail of that internecine dispute save to say it is part of the Claimant's claim that it sits behind the decision to dismiss him.
- (6) The Claimant pursues a claim for unfair dismissal. Both parties were represented by Counsel. The Claimant was represented by Mr R O'Dair and the Respondent by Mr D Stewart.
- (7) The hearing took place over the course of one day on 31 May 2019..

Findings of fact

- (8) The Company was incorporated in June 2010. Mr Darby and Mr Sullivan took responsibility for developing the Company's product software and producing a platform on which to sell it. The Claimant's role was that of business manager. Therefore he dealt with all such unrelated matters to the core development of the software as banking, accounting, legal registration etc. The registered office of the Respondent was at the Claimant's house. Essentially the Claimant had responsibility for the day to day management of the Company's finances and Mr Darby and Mr Sullivan concentrated entirely on the development and sale of The Company's products.
- (9) There was an expensive and damaging legal action early in the Company's history relating to claims by a former company of the directors alleging theft of intellectual property.
- (10) It is clear that neither Mr Darby nor Mr Sullivan took any great interest or involvement in the day to day financial administration of the Company and this was entirely left to the Claimant. The Company operates almost entirely through the internet.
- (11) It was in 2013 that salaries were originally fixed at £35,000 albeit in 2014 Mr Sullivan's and the Claimant's salary was raised to £45,000. This is as a result of Mr Darby's involvement having lessened in the Company albeit that changed in 2017 as Mr Darby then took a more active involvement in the Company matching in his hours worked those of Mr Sullivan.
- (12) It is here that matters, the subject of the Respondent's decision to dismiss the Claimant occurred.
- (13) There was an email exchange between Mr Darby and the Claimant which took place on 9 October 2017.
- (14) Mr Darby emailed the Claimant at 11.05 on 9 October essentially instructing him to increase his (Mr Darby's) salary to bring it in line with that of Mr Sullivan from £35,000 per annum to £45,000 per annum.

- (15) The Claimant responded at 16:52 the same day and said the following:

"Hi Kier

It is probably more than reasonable to review our salaries as they have been unchanged for some time.

There are several things to take into account and I guess that the starting point is what Mike's timing is regarding his stepdown. Have you mentioned increasing salaries to Mike? Perhaps this whole thing would be better done by chat.

The wider impact is things like pension contributions, a high tax bracket, additional national insurance contributions and reducing dividend capacity.

There are a number of things that could and should be done regarding our salaries for efficiency but it may be that you are simply want your salary increased. Let me know Ashley."

- (16) At 16:57 Mr Darby responds:

"Buying a house last year has left me struggling with finance so a simple increase is all that is required at this juncture.

With regard to Mike's departure he hasn't mentioned it in a while and we are past the point where he said he would be leaving, so I am not sure what's happening there, and now isn't the time to enquire, with so much work underway to get 2.0 ready, I am reluctant to remind him that he said he would be gone by now.

Discussions will be necessary once the 2.0 finish post is in sight to find out exactly what he plans to do.

Kier"

- (17) Pursuant to this exchange the Claimant increased not only Mr Darby's salary to £45,000 but his own.

- (18) He sought confirmation of this from Mr Sullivan in an email of the same date timed at 18:12 which reads:

"Hi Mike

I received this from Kier and wanted to check if you had any objections. I would also want to increase my salary in keeping. Regards Ashley."

- (19) He received no reply. He proceeded to increase his own salary as well as Mr Darby's.

- (20) In evidence Mr Sullivan said that he had responded at 15:15 having been copied into the chain of emails between the Claimant and Mr Darby to Mr Darby with the words "fair enough" confirming that he was happy for Mr Darby's salary to be increased.
- (21) He said he did not respond to the email to him timed at 18: 12 specifically asking him whether he was happy for the Claimant also to increase his salary. He said he did not recall noticing the Claimant's desire to increase his own salary. Under a cross-examination he said he could never recollect ever having seen that email and said that he may have missed it because it was folded together in a thread. He said he only saw it when matters came to light after there was surprise that the Claimant had increased his own salary as well in April 2018.
- (22) It emerged in the giving of evidence that the Company, which was essentially an internet company, was run on an informal basis. However it was the Claimant who had control and responsibility for all administration and financial matters.
- (23) On the subject of the salary increase the Claimant gave evidence that he understood that the exchanges that took place between him and Mr Darby constituted an agreement for both his and Mr Darby's salary to be raised. I am not impressed by this evidence. On any reasonable analysis the email exchange between him and Mr Darby made it clear that only Mr Darby's salary was to be increased. The fact that in the first line of his email timed at 16:52 the Claimant used the words "our salaries" did not at all detract from the meaning of the exchanges between him and Mr Darby which were specifically to do with the increase of Mr Darby's salary not the Claimant's.
- (24) In response to the Claimant's comment "but it may be that you are simply want your salary increased" Mr Darby replied "Buying a house last year has left me struggling with finance so a simple increase is all that is required at this juncture."
- (25) Mr Sullivan was then copied into that email exchange and commented "fair enough". He did not reply to the specific email sent to him by the Claimant asking for the Claimant's salary to be increased sent at 18:12.
- (26) I cannot on any interpretation understand how the Claimant could reasonably take that exchange as constituting an agreement for him to increase his own salary. Yet he did so. When questioned closely in cross-examination he was not able to point to any of these emails to justify his claim that he had had authority from the other directors to increase his own salary. He even ventured to suggest that a failure to reply to his specific email asking for an increase to Mr Sullivan could be taken as acceptance.
- (27) I cannot accept this.
- (28) The second of the allegations which brought about the termination of the Claimant's employment arises out of payments to himself by the Claimant whilst

he was in control of the Company bank accounts of sums of money purportedly in respect of mileage incurred by him on company business.

- (29) Mr Darby gave evidence to the effect that he was first alerted to a difficulty concerning the Claimant's claiming of his sums of money by way of mileage in March 2017 when he received a telephone call from HMRC stating that there were irregularities in the Respondent's accounting and they owed a large sum of money. He had not monitored Company finances for some time and had allowed the Claimant to control them. When he reviewed company reports he found them to be lacking in detail and he said that the presence of travel expenses perplexed him as the Company is an internet based company and has no face to face interaction with its customers and yet the accounts for 2014 and 2015 suggested the Company had paid travelling expenses in excess of £7,000 each year. Accordingly on 23 March 2017 Mr Darby emailed the Claimant asking him to explain certain financial issues. In emails dated 21 March and 22 March Mr Darby and the Claimant had an exchange. Most specifically in his email of 22 March Mr Darby finished his email with the paragraph:

"Secondly, I notice that we are declaring £1,417 in travel expenses for 2016, and £6,194 for the previous year. We also show £7,886 for 2014 and £5,443 for 2013. Given that all employees and contractors are remote and don't engage in business related travel what constitutes these figures?"

- (30) In response to that paragraph the Claimant simply replied on 23 March in terms:

"The travel expenses relate my travels."

- (31) It wasn't until January 2018 that Mr Darby was in a position to consider future plans for the Company and started chasing the Claimant and the Company book keeper Sue Highet requesting copies of the management accounts for the Company for the previous few years. He was aware that the Claimant had provided accounting detail to the book keeper to enable accounts ultimately to be prepared. Further investigation ensued on receipt of the Company accounts from the Company book keeper in February 2018 and in April 2018 on accessing the Company's bank accounts revealed to Mr Darby that there had been a history of unexplained payments to the Claimant and one to Mr Sullivan in 2013 which were not related to pay.

- (32) Moreover at or about this time Mr Darby discovered the increase in salary which the Claimant awarded himself pursuant to the email exchange in October 2017.

- (33) It was at this point that Mr Darby progressed matters. Accordingly on 8 May 2018 Mr Darby emailed the Claimant asking him searching questions about a number of matters to do with the accounts but also to do with mileage claims paid to the Claimant between 2012 and 2018. The response was vague and non-committal and the Claimant said that the payments related to travel and out of pocket expenses. The Claimant said he didn't have detailed records as he deemed it unnecessary and claimed back expenses incurred for work via

mileage allowance. Mr Darby then questioned the Claimant about the salary increase.

- (34) The responses prompted Mr Darby to move to a disciplinary process. This was communicated to the Claimant on 25 May and a disciplinary meeting was scheduled and took place on 1 June. This took place at a nearby Holiday Inn and there were a note taker present. Mr Darby took an audio recording of the meeting for the purposes of producing a transcript which was in front of this Tribunal.
- (35) The subject matter of the disciplinary process included essentially two allegations. One relating to the salary increase which it was alleged the Claimant unilaterally awarded himself and secondly claiming what appeared to be bogus or unexplained payments annually stated to be in respect of mileage incurred in the course of his employment. Payments ranged from £1,400 to greater sums from or about 2013 onwards. It emerged that to justify payments made to the Claimant, the Claimant would have had to incurred some 25,000 miles in the course of his employment during 2013 to 2018.
- (36) Once again I am bound to say that during this Tribunal I found the Claimant's responses to cross examination on the question of these claims to be unimpressive in that they were both vague and contradictory. He appears both at the time of the disciplinary process in seeking to reply to Mr Darby and in subsequent explanation to this Tribunal to be suggesting that the payments did not purely relate to mileage but they related to expenses. Naturally it would be most irregular and in breach of HMRC guidelines for payments to be made to an employee/director as mileage claims when actually they related to something else. Even if that were the case it appears that at no time has the Claimant been able to justify the sums he was claiming. That is the case both in the disciplinary process in response to Mr Darby and before this Tribunal. His responses were contradictory. At one point he said that he had kept a bundle of expenses but no longer had them and then variously at other points he indicated that he never kept records of any description. More than once he had admitted that the process was far from perfect. He said he claimed out of pocket expenses through mileage and that the Revenue might have considered that to be a dishonest process. In essence what the Claimant did was to make payments to himself annually, record them as mileage claims in the Company's management accounts but in respect of which there was absolutely no documentary proof.
- (37) Pursuant to the disciplinary meeting Mr Darby, who conducted the meeting, wrote to the Claimant in a letter dated 7 June dismissing him. The reasons for the dismissal are set out in the letter but are twofold. First the unilateral increase of salary the Claimant paid to himself without justification and the unjustified payment to himself of mileage expenses from 2013 to 2018.
- (38) I should also mention that during the course of Mr Darby's investigation it emerged that at the outset that Mr Sullivan also received a similar payment for mileage in 2013. Evidence emerged that such a payment was only made once. Mr Sullivan gave evidence to the effect that he felt uncomfortable about such

payments being made for obvious reasons and indicated to the Claimant that he wished no further payments to be made to him beyond that first payment in 2013. He produced a statement to Mr Darby in advance of the disciplinary process which I do not need to repeat here. He was also subject to disciplinary proceedings as a result of having received a single payment in 2013 of £3,445.20 identified in the accounts as prior year mileage.

- (39) As this was a one-off payment made to Mr Sullivan not initiated by him but clearly accepted by him and something which he subsequently felt sufficiently uncomfortable about to tell the Claimant that he wished to receive no further payments he was disciplined pursuant to a process but not dismissed.
- (40) The Claimant was summarily dismissed on 7 June 2018.
- (41) I am bound to comment on the suggestion raised during these proceedings and ventured in submissions but the Claimant's Counsel that the disciplinary process was really nothing more than a sham to remove the Claimant from the Respondent. Reliance is made on the internecine family dispute and the fact that there were a number of without prejudice discussions prior to the decision to dismiss being taken which evidenced an underhand motive.
- (42) Tribunals are familiar with conspiracy theories which are often advanced and ventured as the reason for dismissal.
- (43) I have seen and heard no evidence to suggest to me that the assertion made by the Claimant and his Counsel that the Claimant's dismissal was purely because of the bitter family dispute has any basis in fact. I do not accept Mr O'Dair's submission that this was simply a well-choreographed attempt to get rid of the Claimant. The Claimant's Counsel makes much of the meeting on 18 May prior to the disciplinary hearing but after Mr Busby was aware of the issues which subsequently more the basis of the disciplinary hearing. That meeting, was short and may well have been a proper and reasonable attempt to avoid the necessity of going through a disciplinary process.
- (44) The Claimant appealed the decision to dismiss and that appeal was heard by Mr Sullivan who upheld the decision. The appeal hearing was heard on 6 July 2018 and the result was produced by Mr Sullivan on 16 July. The decision to dismiss was upheld. In that process Mr Sullivan dealt with aspects raised as grounds of appeal by the Claimant that the hearing was not impartial and that there was no reasonable investigation undertaken into the matter. Parts of the appeal took the form of a re-hearing concerning the Claimant's assertion that the pay increase had been agreed and that Mr Darby and Mr Sullivan were aware of the mileage payments. These issues were considered by Mr Sullivan and a response was set out in the appeal outcome. They were not upheld.

The Law

- (45) This is an unfair dismissal claim and under **Section 98** of the Employment Rights Act 1996 (**ERA**) it is for the employer to show what the reason was for the dismissal and it must be determined that it was one of the potentially fair reasons set out in that section, **Section 98(2)**.

- (46) In this case the Respondent relies on conduct.
- (47) **Section 98(4)** then deals with the fairness of such a dismissal.
- (48) In respect of **Section 98(4)** in a conduct related dismissal the Tribunal must have mind to what is known as the **Burchell** test pursuant of the case of **British Home Stores v Burchell [1980] ICR 303**. In essence the Respondent must show that it had a reasonably held belief in the Claimant's guilt pursuant to a fair investigation in all the circumstances.
- (49) The Tribunal must ultimately determine whether the decision to dismiss fell within the band of reasonable responses available to an employer faced with that set of circumstances pursuant to the test in the case of **Iceland Frozen Stores v Jones [1983] IRLR439 ICR 17**.
- (50) It is not for a Tribunal to substitute its own view but only to ascertain whether the decision of the employer fell within that band of reasonable responses.
- (51) The Tribunal must also have in mind to whether a fair procedure was followed and must take into account the ACAS Code of Practice.

CONCLUSIONS

- (52) It is the Claimant's suggestion that there is a background of a family dispute involving specifically Mr Darby and himself which has influenced the decision to dismiss in this case.
- (53) I cannot accept that there is any evidence to support that theory. Certainly there may be a particularly virulent internecine dispute either in the past or extant but applying the legal principles set out in **Section 98** and the tests I am bound to consider by virtue of the authorities set out above I cannot conclude other than that the Respondent was entitled to dismiss the Claimant.
- (54) There is no doubt in my Judgment that the real reason for the dismissal was conduct. Having concluded that based on the evidence I further find that Mr Darby followed a fair and proportionate procedure in conducting the disciplinary process. The Company is a small one and there are only three directors. In an ideal world it would perhaps have been better if Mr Darby had not conducted the disciplinary process himself and made the decision to dismiss but I conclude that in the circumstances of this particular case it was reasonable for him to do so. There was the failsafe of Mr Sullivan who in my Judgment also conducted a properly constituted and reasonable appeal.
- (55) It was in April 2018 when matters started to emerge concerning the financial aspects of the Company that Mr Darby started to conduct an investigation into the Claimant's handling of the Company's financial matters. This revealed that the Claimant had paid himself an additional salary and that he had been for some time making payments to himself specified to be payments for travelling expenses which bore no proper examination.

- (56) Mr Darby conducted an investigation and proceeded to a disciplinary hearing. The Claimant's explanation for the salary increase was the same as he ventured before this Tribunal namely that it had been agreed. On any analysis the emails in question could not have constituted such an agreement. Moreover the Claimant's explanation as to the payments made to him under the guise of travel expenses were equally as unsatisfactory in the disciplinary process as they were before this Tribunal. He seemed to suggest that the payments were not for mileage but were for expenses. That in itself is highly irregular but worse he kept no records and could not even begin to justify the sums paid to him over the course of four and a half years.
- (57) Both of these issues which were the subject of disciplinary proceedings were properly investigated and it was entirely reasonable and appropriate for Mr Darby to proceed as he did to dismiss the Claimant.
- (58) I conclude that the **Burchell** test was passed and that Mr Darby had a reasonably held belief in the Claimant's guilt pursuant to a proper investigation in the circumstances.
- (59) Moreover a decision to dismiss fell within the band of reasonable responses of an employer faced with the set of circumstances before him pursuant to the disciplinary process.
- (60) The dismissal was therefore fair under **Section 98** of the Employment Rights Act 1996. The Claimant's claim must therefore fail and is dismissed.

Employment Judge KJ Palmer

Date: 22 August 2019

Sent to the parties on:

.....28.08.19.....

For the Tribunal:

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