



IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

**Judgment of the Employment Tribunal in Case No: 4112621/2018 Heard at
Edinburgh on 1st October 2019**

Employment Judge J G d'Inverno, QVRM, TD, VR, WS

Mr John Rae

**Claimant
Represented by
Ms L McKenna,
Solicitor**

John Rae Ltd (in liquidation)

**Respondent
Not appearing and not
represented**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is:-

(First) That the claimant's complaint of wrongful dismissal succeeds and the respondent shall pay to the claimant the net sum of £8,663.01 in lieu of 12 weeks' notice of dismissal.

(Second) That the claimant's complaint of constructive unfair dismissal in terms of section 95(1)(c) and 98(4) of the Employment Rights Act 1996 succeeds and that the respondent shall pay to the claimant:-

- (a) A basic award of £14,670 being (30 weeks) at (£489 per week) being the maximum week's applicable as at the Effective Date of Termination on 20 March 2018;
- (b) A compensatory award of £500 in respect of loss of statutory rights.

(Third) That the claimant's complaints of breach of contract succeed and that the respondent shall pay to the claimant:-

- (a) the sum of £17,129.96 being the balance of net wages contractually due to the claimant in the period 12 May 2017 up to and including 20 March 2018 and retained by the respondent and not paid by it to the claimant, in breach of contract, as at the Effective Date of Termination of his employment;
- (b) the net sum of £7,550 being the employer's pension contribution, at the rate of £9,000 per annum, proportionate to the part year 12 May 17 to 20 March 2018 and retained and not paid by the respondent, in breach of contract as at the Effective Date of Termination;
- (c) the net sum of £1,166.66 in compensation for non-payment of 35 days contractual entitlement to paid annual leave accrued by the claimant in the 12 month period immediately preceding the Effective Date of Termination, 20 March 2018, but untaken and outstanding at the cessation of his employment;
- (d) the sum of £4,116 in the name of medical insurance premium being the amount of the annual £5,000 premium proportionate to the period 12 May 17 to 20 March 18 and unpaid by the respondent as at the Effective Date of Termination;
- (e) the sum of £10,000 being the amount, proportionate to the period 12 May 17 to 20 March 18, of car allowance due in contract by the

respondent to the claimant at the rate of £12,000 per annum and unpaid by the respondent as at the Effective Date of Termination;

- (f) the sum of £833 being the amount proportionate to the period 12 May 17 to 20 March 2018 of the wifi allowance due in contract to the claimant at the rate of £1,000 per annum and unpaid by the respondent as at the effective date of termination;
- (g) the sum of £2,500 being the amount proportionate to the period 12 May 17 to 20 March 18 of the “call out” allowance contractually due to the claimant at the rate of £3,000 per annum and unpaid by the respondent as at the Effective Date of Termination

REASONS

1. This case called for Final Hearing at Edinburgh on 1 October 2019 at 10 am. The claimant was present and was represented by Ms McKenna, Solicitor, the respondent company, which had entered Creditors Voluntary Liquidation on 27 September 2018, was neither present nor represented. On 25 September 2019 the claimant’s representative, acting in the capacity of *amicus curia* advised the Tribunal that she had been informed by the Office of the Liquidator that the Liquidator did not intend to appear or be represented at the hearing.
2. The claimant gave evidence on oath which the Tribunal accepted as both credible and reliable.

The Claims

3. The claimant presents complaints of:-

- (a) wrongful dismissal,
- (b) constructive unfair dismissal in terms of section 95(1)(c) and 98(4) of the Employment Rights Act 1996 and seeking:-
 - a basic award being 30 weeks at the then applicable maximum of £480 per week in the sum of £14,670
 - a compensatory award restricted to
notice pay quantified in the sum of £8,663.01
compensation for loss of statutory rights in the sum of £500
- (c) of breach of contract and seeking awards in respect of:-
 - (i) arrears of wages due and outstanding for the period 12 May 17 to the Effective Date of Termination of employment 20 March 2018 in the net sum of £17,129.96
 - (ii) proportionate payment in respect of employer's pension contribution in the same period in the sum of £7,550
 - (iii) 35 days (one year's entitlement to) holiday pay in the sum of £1,166.66
 - (iv) a proportionate payment in respect of medical insurance premium, in the same period, in the sum of £4,116

- (v) a proportionate payment in respect of a car allowance, in the same period, in the sum of £10,000
- (vi) a proportionate payment in respect of a wifi allowance in the same period in the sum of £833; and
- (vii) a proportionate payment in respect of call out allowance in the same period in the sum of £2,500

Findings in Fact

4. The claimant's date of birth is 13th of the 12th 56.
5. The claimant's employment commenced with the respondent company's predecessor business in 1984 and was transferred to the respondent company with continuity of employment.
6. The Effective Date of Termination of the claimant's employment was the 20th of March 2018.
7. The claimant's age at termination of his employment was 61.
8. As at the date of termination of his employment the claimant had accrued 34 years of continuous service.
9. As at the date of termination of employment the claimant's net annual salary was £52,000 or £1,000 per week.
10. As at the date of termination of his employment the claimant's gross weekly pay, for the purposes of calculating a basic award, was subject to the then applicable maximum of £489 per week x 30 weeks.

11. On the 12th of May 2017 the claimant and his wife, who were the principal shareholders in the respondent company, sold their shares to Sunvic Controls Limited. The claimant and his wife were also employees of the respondent company, the claimant in the capacity of Manager and Director and his wife in the capacity of Company Secretary. The claimant continued to be employed as a Director and Manager following the implementation of the Share Purchase Agreement on 12th May 2017. Prior to the implementation of the Share Purchase Agreement the claimant's terms and conditions of employment were regulated by a written contract dated 6th October 2008 (pages 52-55 of the Bundle). In terms thereof the claimant was partially remunerated in wages and partially by payment of dividend arising from his shareholding. The claimant was also provided with a company car prior to the implementation of the Share Purchase Agreement.
12. The claimant's contractual entitlement prior to 12th May 2017 included the following benefits:-
 - (a) Employer's pension contribution of £9,000 per annum;
 - (b) 35 days of paid annual leave;
 - (c) An employer's medical insurance premium of £5,000 per annum;
 - (d) A wife allowance of £1,000 per annum; and
 - (e) A call out allowance of £3,000 per annum.

The claimant's contractual entitlement to those benefits continued without variation in the period following the implementation of the Share Purchase Agreement on 12th May 2017, up to and including the Effective Date of Termination of his employment on 20th March 2018.

13. The Share Purchase Agreement was negotiated between the claimant on his own behalf and on behalf of his wife, on the one hand, and Mr Lawrie Williams, named Director of Sunvic Controls Limited on the other. Mr Williams had actual authority of Sunvic Controls Limited to do so.
14. The purchasing company while assuming the financial management and control of the respondent from 12th May 2017, wished the claimant to remain in employment

as Construction Director and Manager, in order to manage the flow of ongoing contracts, for a period of two years from 12th May 2017.

15. At a meeting that proceeded between the claimant on the one hand and Mr Lawrie Williams on behalf of the purchasing company in the first week of April 2017 the claimant agreed to so continue in the respondent's employment in consideration of the following variations to his terms and conditions of contract:-

- Following discussion at the meeting the following terms were proposed by the claimant and agreed by Mr Lawrie Williams namely that the claimant would work for the first 12 month period on a full time basis and for the second 12 month period at a reduced number of three days per week
- Following his sale of the shares the claimant's pay would be increased to the salary level of £52,000 per year net that is £1,000 per week net and;
- with effect from 1st May 2019 the claimant would be entitled to a car allowance at the rate of £12,000 per annum. The claimant's other pre-existing benefit of employer's pension contribution holiday pay, medical insurance premium, wifi allowance and call out allowance all continued unvaried

16. Those variations were ratified by the respondent company following the implementation of the Share Purchase Agreement.

Breach of Contract

17. In the period following the implementation of the Share Purchase Agreement the respondent continuously failed to remunerate the claimant in the amounts contracted for. The respondent failed to adjust his regular monthly wage payments to take account of his increased salary which had been varied in light of his no

longer receiving dividend payments. For several months they failed to pay the claimant any wages.

18. The claimant continuously requested of Lawrie Williams and the respondent's internal Accountant Gerry Zambonini who following the implementation of the Share Purchase Agreement functioned as authorised agents of the respondent company and was assured by them on each occasion until the 23rd of February 2018, that the arrears of wages would be paid to him together with other outstanding sums. In the week commencing the 20th of February 2018 the Managing Director of the group of companies, Mr Meding, which had acquired the respondent contacted the claimant by telephone and stated that he wished him to resign as a Director of the respondent company immediately and to leave the respondents' premises. When the claimant asked for an explanation as to why such a request was being made of him Mr Meding terminated the telephone conversation. The following day, 23rd February 2018, the claimant attempted to speak further with Mr Meding by telephone but Mr Meding was unavailable. The respondents' Lawrie Williams returned the claimant's telephone call. He again told the claimant to leave the respondents' premises and that if he attempted to bring a claim against the respondent company he would not succeed and that the respondents would make a complaint of fraud against him, the claimant. When the claimant asked for details of the alleged fraud Mr Williams refused to provide the same and told the claimant that he would not receive payment of his arrears of wages.
19. The entitlement to receive, and the obligation to pay, wages for work done was a fundamental express term of the claimant's Contract of Employment.
20. The respondents' continuing failure to timeously pay the claimant's wages in the proper amounts constituted a continuing material and repudiatory breach of contract.
21. The respondents' communication via Lawrie Williams to the claimant on 23rd of February 2018 that he should leave the respondents' premises and that the

respondents would not pay his arrears of wages to him constituted a separate material and repudiatory breach of the claimant's Contract of Employment.

22. The same conduct separately constituted a repudiatory breach of the term of confidence and trust implied in the claimant's Contract.
23. In the face of those breaches the claimant was entitled to accept the repudiation and to resile.
24. That conduct of 23rd February 2018 separately constituted a "last straw" for the purposes of entitling the claimant to resign in response thereto and treat himself as constructively dismissed in terms of section 95(1)(c) of the Employment Rights Act 1996.
25. The claimant left the respondents' premises as directed but, by reason of obligation which he felt he owed to the employees of the respondents' company whose Manager he functioned as, he worked from home to facilitate the transmission of his managerial duties to other members of staff with a view to allowing work to continue to be carried out and the company's contractual obligations to be honoured, before resigning by letter dated 16th March 2018.
26. In his letter of resignation the claimant identified, amongst other breaches of contract and conduct on the part of the respondent; as conduct which he resigned in response to the respondents' repeated and continuing failure to pay him his wages in the proper amount or at all and the respondents' expressly communicated intention, on 23rd February 2018, not to pay him the balance of sums due to him including his outstanding wages.

Findings in Fact and in Law and Disposal

27. In so terminating his Contract of Employment by letter dated 16th and communicated to the respondent on 20th March 2019, the claimant did so in circumstances in which he was entitled to do so, without notice, by reason of the

respondent's conduct the same being, amongst other matters, their material and repudiatory breaches of contract as evidenced by their failure to pay and refusal to pay the claimant the wages due to him and their breach of the obligation of the implied term of confidence and trust. The claimant resigned on 23 February 2019 in response to those reiterated and further breaches of contract on the part of the respondents including in response to the "last straw".

28. In the particular circumstances pertaining, and in the light of his reasons for so doing, the claimant's continuing to work from home to facilitate the transfer of his management responsibilities in the period 23rd February to 20th March 2018, did not constitute affirmation of the contract by him. In the circumstances pertaining the claimant was constructively dismissed by the respondent in terms of section 95(1)(c) of the Employment Rights Act 1996.
29. The respondent's actings in refusing to pay the claimant wages due to him and by informing him that they would not make payment of the same in the future, in instructing the claimant to leave the respondents' premises and to resign as a Director without providing him with reasons; in failing to follow a procedure and in threatening him with complaints of fraud without providing him with any details of the same, the respondents acted unreasonably in dismissing the claimant and the claimant's constructive dismissal falls to be regarded as unfair in terms of section 98(4) of the Employment Rights Act 1996.
30. In the period 12 May 17 to 20 March 2018 the claimant was contractually entitled to receive from the respondent total wages for work done in the net sum of £43,528.99. In the same period the respondent made payment of wages to the claimant in the net sum only of £26,399.03 resulting in a net shortfall in the claimant's wages for the period of **£17,129.96**.

Remedy

31. In consequence of his unfair dismissal the claimant is entitled to receive a basic award based upon 30 weeks gross pay at a maximum of £489 in the sum of £14,670.
32. To a compensatory award restricted in terms of his claim, to amounts in respect of:-
- (a) Notice pay in the sum of £8,663.01 and compensation for loss of statutory rights in the sum of £500, all in terms of the claimant's Schedule of Loss as amended in the course of hearing on the 1st October 2019 and produced at page 51(a) of the Bundle;
33. The respondent's failure to make payment, of outstanding sums due to the claimant, as at the date of termination of his employment in respect of:-
- (a) balance of wages due, pension contribution, compensation in lieu of accrued but untaken annual leave, medical insurance premium, car allowance, wifi allowance and call out allowance all separately constituted breaches of contract on the part of the respondent in the face of which the claimant is entitled to be compensated in damages.
 - (b) The measure of damages in contract is a sum of money the payment of which will place the claimant, the innocent party, in the position that he would be in but for the breach. The claimant is accordingly entitled to receive from the respondent and the respondent shall pay to the claimant sums of money under each said head being,
 - (i) in respect of unpaid wages the balance between the total amount of remuneration to which the claimant was entitled in the period 12th May 17 to 20th March 18 (that is the net sum of £43,528.99) less the total net sum received by the claimant in the same period (that

is the net sum of £26,399.03) amounting to a shortfall of wages due to the claimant of **£17,129.96**.

(c) In respect of the other elements of loss the amount, proportionate to the period 12th May 17 to 20th March 18, of the claimant's annual contractual entitlement the same being respectively in respect of:

- (a) employer's pension contribution **£7,550**
- (b) holiday pay **£1,166.66**
- (c) medical insurance premium **£4,116**
- (d) car allowance **£10,000**
- (e) wifi allowance **£833**
- (f) call out allowance **£2,500**

Date of Judgement: 7th October 2019
Employment Judge: JG d'Inverno
Date Entered in Register: 8th October 2019
And Copied to Parties