



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr S Ridley

v

Francesco Holdings Ltd

(in creditors' voluntary liquidation)

Heard at: Watford

On: 29 October and 30 October 2019

Before: Employment Judge Bloch QC

Appearances

For the Claimant: In person

For the Respondent: No appearance

JUDGMENT

1. The claimant's complaints of unfair dismissal and breach of contract (notice pay) are upheld.
2. The claimant is awarded the following sums:
 - 2.1 £ 21,520.47 for unfair dismissal;
 - 2.2 £0 for breach of contract (failure to pay notice money).

REASONS

1. The issues in this case are:
 - 1.1 Whether the claimant was unfairly dismissed, the alleged dismissal being in the form of a constructive dismissal;
 - 1.2 If the claimant was constructively and unfairly dismissed, the amounts which he is entitled to by virtue of his unfair dismissal; and
 - 1.3 Whether the respondent breached the claimant's contract of employment by failing to pay him the appropriate amount of notice money.

2. At the hearing today only the claimant appeared and I questioned him closely on his evidence (given by witness statement and orally). Prior to the hearing the tribunal was informed on behalf of the respondent that it had gone into voluntary creditors liquidation (on 9 April 2019) and that the respondent's witnesses would not be attending the tribunal to give evidence. However, witness statements were submitted signed by Paul Hazlehurst and Richard Mathea.
3. I accepted the evidence of Mr Ridley, who I concluded was both accurate and truthful in his recollections. Insofar as his evidence contradicted that contained in the witness statements of Mr Hazlehurst and Mr Mathea, I preferred the evidence of the claimant. It is well known that greater credence may be given to evidence which is produced "live" and is therefore subject to interrogation (in this case by the tribunal) as compared with evidence which is submitted only in writing and therefore not subject to cross-examination. In any event I concluded that the evidence of the claimant was more logically consistent, both internally and when tested against the documents than the evidence produced on behalf of the respondent in the form of the two witness statements.
4. The claimant began work with a predecessor of the respondent on 15 February 1993 as a night baker. However, he performed that function for a relatively short period of time and within a year, following demonstration of his computer skills, he was asked to move to the bakery office, where he ran the bakery back office and sales department. At a later stage he moved over to the head office to help move the company's technology forward. In the claimant's job description attached to his employment contract dated 30 October 2003 the claimant is described as an Information Technology Manager. He was responsible to the managing director of the board for all of the company's IT systems as well as company payroll and cash handling monitoring. He had direct responsibility for the following:
 1. EPOS, tool programming, tool repairs, kitchen printer repairs, cable management and credit card machines;
 2. Computers, server management on and off site, branch PC management and repair and maintenance of all company computer hardware printers and networks;
 3. Software, installing and upgrading of all software (except accounts), creating and editing branch spreadsheets and 24-7 support for all IT systems;
 4. Payroll (input and creation of payroll for 5 restaurants and bakery and calculating holiday entitlement);
 5. Visual and design (design and creation for approval of menus, posters, adverts and leaflets);

6. Cash handling (to investigate any daily cash sheet, weekly reconciliation and safe problems and to help rectify and report findings to head office).
5. There was no other documentation amending or updating that job description. Further, the respondent appeared in its witness statements to accept that the governing employment contract was that of 30 October 2003, indeed relying on certain of its provisions in their Grounds of Resistance.
6. Between 2007 and 2009 the employing company's sales revenues began to fall and the directors took the decision to take the company into administration. There was a transfer (as I understand it) of the business of that company to the respondent. Nothing changed in terms of the claimant's employment (or its continuity) or the identity of the persons to whom he reported. After the sites of the company were moved over to the new company the claimant was asked to put the company back on an even keel by helping to sort out contracts with suppliers and for a short time he added to his workload by looking after basic repairing of restaurant equipment. He did this to help out Mr Hazlehurst (at various times a director), so that costs could be kept down, to give the remaining three sites the best chance of survival. It was also agreed that he would work from home in regard to his IT duties or find an empty table to do so in one of the restaurants. He would be called out for IT emergencies on an almost daily basis for IT or equipment repair issues.
7. In 2013 the claimant had a conversation with Mr Hazlehurst, to whom he reported, with regard to his being asked to take on a part-time job from a local property developer as a property manager and it was agreed that he could do this, as at that point in time Mr Hazlehurst was unable to furnish the claimant with any pay increases and because there was never any time that the second job would need the claimant to do anything in a hurry. Work could be done when the claimant was not working at the respondent and any phone calls received while working for the respondent were left to the answerphone to be dealt with at a later stage. This went on for the next four to five years without any problems.
8. In October 2017 the management staff were introduced to Mr Carlo Spetale by Mr Hazlehurst and the claimant was told to help him in any way needed and to give him any information he would like.
9. In November 2017 the management and staff were told in a telephone conversation with Mr Spetale that "he" had bought the business, more specifically, that the respondent had been purchased by JHRG Restaurants Ltd.
10. The claimant had by this time been working as an IT manager at the respondent for the last 15 years dealing with websites, social media, menu design, site IT including but not limited to tills, spreadsheet design and implementation, supplier contracts including pricing, payroll and HR and organising equipment repairs.

11. The claimant's dealings with Mr Spetale were not happy. He felt progressively marginalised and belittled by Mr Spetale who regarded the IT as "very messy". The claimant felt undermined by Mr Spetale to the point of it starting to affect his mental health. This came to a head on Friday 16 March 2018 when he had what he described as a "breakdown" after a conversation asking Mr Spetale for some holiday to which the claimant was entitled. He had been asking for this holiday for some considerable time, without success.
12. Later that afternoon after consulting with Mr Hazlehurst a meeting was organised with Mr Mathea (another company director). There was an hour long conversation where the claimant told Mr Mathea that he was unhappy about how he was being treated by Mr Spetale. Further, his potential ability, namely his ability to contribute to the respondent, was being used at about 30-40%, he believed. Mr Mathea said that he would like to use the claimant's skillset within the respondent and another associated company, called Jung. The claimant was optimistic as a result of this meeting and could now see a way forward.
13. However, from the following Monday, Mr Mathea slowly started to take all the duties that the claimant performed away from him, starting with web design, web hosting, menu and art creation. Then, to add to this, the current administrative staff started telling the claimant that he should learn to do bakery administration (ie taking bakery orders and answering telephone orders). Mr Mathea also had the claimant becoming involved in doing bakery stocktaking, order processing, packing and general bakery troubleshooting. An administrative assistant, who was about to leave the company, told the claimant one morning, while he was processing payroll, that she had to teach the claimant her job, as he was taking over her role when she left. She stated to him that she thought it strange, as this seemed rather beneath his pay scale but that is what she had been told to say to him.
14. Mr Mathea then told the claimant that he was to change his working hours from 9-5 to 8-4 and was to be 100% office based. This was no particular problem as far as the claimant was concerned. However, on 22 April 2018 an email was sent to all management staff stating that on a date to be confirmed the claimant would no longer be doing the payroll and this part of his job had been given to someone else in the office. It seemed to the claimant that all his original duties had now been (or were in the process of being) taken away from him and new duties, which were completely different, were being imposed upon him without proper consultation. He regarded these duties as significantly worse than his contracted duties.
15. The claimant raised the issues twice but never received a satisfactory outcome. He had two telephone conversations with Mr Mathea, the first being in the week commencing 2 April 2018. He also spoke to Mr Hazlehurst on this occasion who said that he understood the claimant's concerns but that he (the claimant) needed to speak with Mr Mathea. The claimant did so and was told not to worry, that he would not need to "wear a

skirt" (this seemed to be a reference to the claimant being required to take over the administrative duties of one of the women in the bakery). The second time was in the week commencing 16 April 2018, when the claimant explained that his job was turning into a general administrative role and that he was finding things very tough and did not think he could carry on the way things were going. Mr Mathea's response was to say "not to worry", he would work out a job role for the claimant but the trend of the claimant's contracted role being distributed amongst internal staff or external companies seemed to continue.

16. The claimant explained to me that what he lost was his IT role, eg in relation to the website and emails, and when he went off sick as he did on 23 April 2018 the EPOS function was moved to another company. The payroll functions was also given away to another member of staff, as indicated by an email which was distributed shortly before the claimant went off ill. The claimant estimated that the IT part of his role represented some 65% of his work and the payroll some 15% of his job. Broadly speaking, the whole of the IT part of his job was gone and that was followed by the loss of the payroll aspect of his duties. He summed up the position as being that, if he had returned to work, there was, to all intents and purposes, nothing left of his previous job. It was a new job that was available, namely that of "baking manager cum administrative assistant".
17. Put differently, all of the functions described by Mr Hazlehurst in paragraph 2 of his witness statement were removed from the claimant, namely his duty to conduct head office operations for the directors of the company, and oversee and deal with any operational issues that could not be dealt with by the restaurant managers., the latter included overseeing and performing maintenance, refurbishments, purchasing, supplier liaison, audit and banking of takings and overseeing the IT systems of the business.
18. The claimant describes the result of these changes in his role as being a further breakdown on 23 April 2018 which left him with no option but to consult a doctor, who signed him off for two weeks. There followed further medical certificates issued for a total of eight weeks. The claimant describes his symptoms as including feeling numb, detached and being emotionally unresponsive, depersonalisation, dissociative amnesia, having trouble sleeping, being irritable, having difficulty concentrating and being constantly tense or on guard.
19. There followed correspondence in the form of emails from Mr Hazlehurst requiring the claimant to hand the company telephone back, as the company website was down and they were potentially losing revenue due to their needing a code to be texted to the company. The claimant checked the domain and it had already been moved over and there was a new website designed by someone else. The code Mr Hazlehurst was referring to was needed to download three email iMap files but, even for this, they did not need the claimant's phone as they could have used Microsoft Outlook to download the imap files. The claimant believed that this was a ruse to start an unfounded claim that the claimant had been using his company phone for the purposes of his part-time property manager job. The respondent

also demanded the claimant's bank card back so that it could be used for banking (although the card was in the claimant's name) and for the past two weeks he had not done any banking as this part of his job had been taken away and was now being done by Mr Mathea's wife, who already had a card. The claimant formed the view that he was no longer trusted.

20. On 4 May 2018 the claimant received an email from the respondent's solicitor stating that the claimant needed to give to the respondent his company phone and bank card or else it might amount to gross misconduct. On 9 May he gave the company phone and bank card back to Mr Hazlehurst.
21. On 21 May 2018 and onwards it seemed that the respondents were undertaking investigations in regard to the claimant's involvement in his part-time property management role. This involved using the claimant's company telephone which was now back in the possession of the respondent to make various calls. Most surprisingly, it seems that as part of these investigations the respondent through Mr Mathea impersonated the claimant. So, in emails on page 57 of the bundle Mr Mathea (pretending to be the claimant) responded to an email from a client referring to a leak with the following: "I will pop in and look tomorrow is that okay?". This was admitted in Mr Mathea's witness statement.
22. In reaction to the actions of Mr Mathea the claimant stated in evidence that his stress levels were increasing and he and his wife were concerned by what Mr Mathea might do next. This resulted in the claimant on 25 May contacting the police about Mr Mathea's actions and the service of the Police Information Notice on Mr Mathea.
23. The claimant adamantly (both in his witness statement and before me) denied that he had ever willingly agreed and understood that he would have the majority of his roles taken away and would work full-time in Jung's Beaconsfield office and manage the bakery. At no point did he agree to any of this. The only thing that he agreed to was to have an office to work from. Further, there was nothing in writing to suggest any such radical change of the claimant's job description.
24. These events culminated in the claimant's letter dated 4 June 2018 addressed to the respondent. He stated as follows:

"I am writing to inform you that I am resigning from my position of IT manager with immediate effect. Please accept this as my formal letter of resignation and a termination of our contract. I feel that I am left with no choice but to resign considering my recent experiences regarding what I consider my position being made redundant.

- (a) **A fundamental breach of contract:** Mr Richard Mathea changed my job role significantly by way of outsourcing or distributing internally major parts of my job role and asking me to do jobs that was not part of my job description thus making me ill and unable to work;

- (b) **Anticipated breach of contract:** I was part of an email circular that informed me that my payroll duties are to be removed to another member of staff sometime in May;
 - (c) **Breach of trust and confidence:** The manor (sic) that I was threatened with misconduct or gross misconduct for not returning a company mobile telephone. While I was off ill it was stated that it was needed for transferring a website and due to not having the said telephone the website was down and you were potentially losing revenue. This was not the case as the website had already been moved to a new server and was up and running. I believe the code may be needed for taking a back-up of email data. This code I did email to Mr Colin Shaw on 23-04-2018. This also could have been done on the client's PC's or Francesco Holdings Ltd could have asked for the code to be forwarded to yourselves the same way Mr Paul Hazlehurst had asked for the user name and passwords for branch routers that I sent to him and he thanked me for.
 - (d) **Last straw doctrine:** Mr Mathea used my company telephone to make person or persons think He was me and falsely told them He had taken over responsibility of my other part-time employment and was providing false information in relation to this causing me distress due to his harassing behaviour so much, so I had to contact the police.”
25. He went on to say that he considered this to be a fundamental breach of the contract on the respondent's part and that a claim for constructive dismissal would be forthcoming.
26. These were the facts as attested to by the claimant and which I accepted. I put to the claimant passages from the witness statements submitted on behalf of the respondent. As to the statement of Mr Hazlehurst regarding his meeting with Mr Mathea on 16 March 2018 the claimant denied that he was fully aware of and agreed to some tasks being taken from him. The only task which he agreed would be taken away from him was that of maintenance which had in any event been intended to be for a short period of time. He denied specifically that he had understood and agreed to the removal of payroll, website maintenance and development and email hosting. As to paragraph 15 of Mr Hazlehurst's witness statement, the only part which the claimant accepted was that some roles could be more readily covered by others - limited to the takings from branches. He did not agree at that meeting to the payroll function being covered by the respondent's book-keeper.
27. As to a telephone conversation between the claimant and Mr Hazlehurst on 25 April where Mr Hazlehurst said that the claimant believed that his existing jobs had been or were being taken from him and that the role had changed, that reflected the reality not what Mr Hazlehurst added, namely that the claimant had willingly agreed to the changes and revised duties. Indeed, it is difficult to understand why the claimant would have been complaining about these fundamental changes to his role if he had agreed happily, as Mr Hazlehurst was saying, to these changes.
28. The claimant also denied that the reason for his resigning from the company was because of a threatened investigation into his use of the company

phone. He had no reason to believe that he had been doing anything wrong in relation to that phone. Other members of staff had for a long time been using their company phones to receive private messages or make private calls because they did not have private phones. The use by the claimant of his phone for occasional work purposes had never caused any difficulty. He explained to me that his i-phones (personal and company phone) were linked. Occasionally tenants might phone and both phones would ring and perhaps the claimant might have responded to some or other of these calls on the company phone. But, there was nothing wrong about that given that there was a single phone package (in the usual way) which provided for no costs for phone calls and texts. I accepted the claimant's evidence that his resignation was not because of an apprehended disciplinary procedure but because of the changes in his role, as indicated in his resignation letter.

29. Turning to Mr Mathea's witness statement. In relation to paragraph 8 it is right that the claimant understood that the limited aspects of his job would be removed but not such fundamental matters as payroll, website maintenance and development. Again, he accepted that he would not do any more handyman duties and agreed with Mr Mathea in relation to 16 March 2018 meeting that the claimant was offered the role of carrying out his IT role for all six restaurant sites and that he had welcomed this. However, that was very far from what happened thereafter. He denied that he ever agreed to manage the bakery as alleged by Mr Mathea in paragraph 12 of his witness statement. Again, the claimant pointed out the contradiction in paragraph 14 of Mr Mathea's statement where he stated that the claimant on 20 April phoned to say that he was not happy about being given jobs to by ladies in the Beaconsfield office but that these were jobs which the claimant needed to do to manage the bakery, a role which he "welcomed" taking on. The whole of the claimant's attitude as communicated to the respondent is inconsistent with his being happy to take on the management of the bakery.
30. Turning to the law, Employment Rights Act 1996 ("ERA") s.95 1(c) provides that an employee is dismissed by his employer if: "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."
31. It is well known that the circumstances there referred to are those such as referred to in the Court of Appeal decision in Western Excavating v Sharp [1978] ICR 221. An employee is entitled to "walk out" of his employment if the employer conducts itself in such a manner as to breach the essential term of trust and confidence which underlies the employment relationship. Where the employer so commits a fundamental breach of the employment contract, the claimant is entitled (timeously) to "accept" the repudiatory conduct and to resign.
32. In my judgment that is exactly what happened in this case. The respondents breached the underlying term of trust and confidence by removing the essence of the claimant's duties and by seeking to impose a new job upon him instead. The claimant was entitled to regard this as a

repudiatory breach of contract. That in itself amounted to a fundamental breach of contract. There is further support for the claimant's complaint of breach of trust and confidence to be found in the respondent's conduct after the claimant had signed off ill. However I do not found the judgment so much on these matters as upon the change of the duties and role of the claimant which I find was not something to which he consented.

33. Accordingly, I turn to ERA s.98 of the Employment Rights Act 1996 (dealing with whether a dismissal is fair or unfair. The section is well known and I will not repeat it here. It is also well known that where there is a constructive dismissal, the employer has still (as in the case of an "ordinary" (ie not a constructive) dismissal) to prove that the dismissal was for a permissible reason (as set out in s.98(2)) and the tribunal has in that case to decide whether the employer treated that as a sufficient reason for dismissing the claimant. Although there is therefore a (usually slim) possibility that a constructive dismissal can be "fair", in my judgment given the stance of the respondent in these proceedings, as set out in their witness statements, namely that the claimant agreed to the substantial changes in his role (which I have rejected) there is in reality no room for the respondent to claim that their dismissal was fair within the meaning of s.98 of the Act.
34. Accordingly, I conclude that the claimant was unfairly dismissed from his employment within the meaning of ERA s.98. It follows that there was also a breach of contract in the respondent failing (as they did) to pay the claimant his notice monies. .
35. Having heard the evidence of the claimant, supported by appropriate documentation, I concluded that he was entitled to the following sums:

1. Basic award

Effective date of termination:	5 June 2018	
Age at effective date of termination:	45	
Number of years' service at effective date of termination:	25	
Statutory weeks pay capped at £508		
22 weeks at £508 per week		£11,176.00
2. Loss of statutory rights £ 450.00
3. Notice 12 weeks (1 week for every year worked to a maximum of 12 weeks) 12 x 7 1.2.10 (capped at £508). (No deduction for mitigation in the notice period)

4 June 2018 to 27 August 2018	£ 6,096.00
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4. Losses to date of tribunal hearing

27 August 2018 to 30 September 2019 (61 weeks) @ £62.27 (net difference in pay)	£ 3,798.47
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Net weekly pay at time of dismissal: £534.98

Net weekly pay in new employment: £472.71

Difference £62.27

£ 21,520.47

Because of the award for compensation for unfair dismissal under paragraph 3 (immediately above), there is no award for failure to pay notice money

Employment Judge Bloch QC

Date: ...6.11.19

Sent to the parties on:

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For the Tribunal Office