



EMPLOYMENT TRIBUNALS

BETWEEN:

Claimant

Respondent

And

Mr J Hind

Househam Sprayers Limited

AT A FINAL HEARING

Held at:

Nottingham

On: 21 November 2019

Before:

Employment Judge R Clark (Sitting Alone)

REPRESENTATION

For the Claimant:

In Person

For the Respondent:

Mr Gould of Counsel

RESERVED JUDGMENT

1. The claim of breach of contract **fails** and is dismissed.

REASONS

1. Introduction

1.1 This claim arises from the Respondent's decision to terminate the Claimant's contract of employment with immediate effect on 29 April 2019. It is brought as a claim of breach of contract as the Claimant did not have the necessary qualifying service at the date of termination to bring a claim of unfair dismissal.

1.2 I say at the outset that I have some sympathy for Mr Hind. He was a victim of a fraud. He has raised a number of matters that might have some force in the context of the fairness of the dismissal and which no doubt fuel his sense of injustice. I have dismissed the claim, however, not because he is necessarily wrong in those submissions, but because the legal test applicable in a case of unfair dismissal is fundamentally different to the applicable test in a claim of breach of contract.

2. Preliminary Matters

2.1 At the outset, I explored the implications of the limit on my jurisdiction to determine a breach of contract claim. In accordance with the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994**, my powers are limited to claims of an aggregate value of up to £25,000. The Claimant claims a little short of £50,000. Were he to succeed and prove the losses claimed, I could not award more than that lower figure. I explained the consequences to Mr Hind, in particular, of him not being able to recover any shortfall if successful and the options of pursuing the matter in the civil courts. However, I also explored the basis for his three heads of loss as there were a number of factors that could potentially reduce the value of his claim. They were, firstly, that no credit appeared to have been given for any mitigation of loss towards the end of the notional 3 month period. Secondly, there appeared to be a duplication within the claim for damages in respect of notice and a claim for loss of earnings during the same period. Thirdly, there did not appear to be a basis in contract for the claim for ongoing financial losses continuing after the period in which the contract could lawfully have been terminated.

2.2 Having explored those matters with the Claimant, Mr Hind indicated his desire to proceed within this jurisdiction. In any event, it seemed that the proper measure of loss was likely to fall within the limits of the Employment Tribunal's jurisdiction.

3. Issues

3.1 There is only one issue in this case. That is, whether the termination of the Claimant's contract of employment without notice was in breach of contract.

4. Evidence

4.1 I heard from the Claimant in support of his case. For the Respondent I heard from Mr Dickinson who conducted the disciplinary hearing and Mr James who conducted the appeal hearing.

4.2 All witnesses adopted written statements on oath and were questioned. I was taken to a bundle running 113 pages and considered those documents I was taken to. Both parties made closing submissions.

5. Facts

5.1 The Respondent is a commercial entity. Its business is in agricultural machinery, in particular agricultural sprayers. It employs around 78 staff.

5.2 Mr Hind was employed from 1 November 2017 as its finance director. That employment was governed by a written contract executed on 23 October 2017 as a deed. On the face of it, clause 14.4 entitled him to 3 months' notice of termination. However, the contract expressly defined two other circumstances in which the contract would come to an end. Clause 14.1 deals with automatic termination upon the Claimant either resigning his statutory office as a director or because of him ceasing to act, or being prohibited from acting, as a director. Clause 14.2 deals with various situations when the employer could terminate without notice. Many of those situations dealt with the possibility of the Claimant's inability, or incapacity, to act in his role as director. Clause 14.2.6 is in respect of acts of gross misconduct.

5.3 The nature of the various circumstances in which the relationship might be ended reflects the very senior nature of this job, as one would expect from his job title. Mr Hind was responsible to the board and reported to the managing director, Mr Willey, who the Claimant described as a demanding boss. Mr Hind was the most senior employee within the finance function. He held wide ranging responsibilities consistent with what might be expected of such a role. The original job advert for the post had made the nature of the role and responsibility clear. The calibre of applicant the Respondent was seeking was commensurate. I have no reason to doubt that outside the context of this case, Mr Hind is a most capable finance director. He clearly satisfied the Respondent of those requirements and was duly appointed.

5.4 The contract of employment continued to reflect and record those high expectations. At clause 3, it explicitly defines a number of responsibilities including the obligation for Mr Hind to diligently exercise all his duties. It is a contract which incorporates the Claimant's obligations under the Companies Act 2006 and his position as an office holder as a statutory director of the company. Of those duties, there is no dispute that they included all areas of financial control at both a strategic and day to day operational level; management accounting and tax accounting; credit control and all aspects of what might be called financial security and financial probity and compliance. The role also carried responsibility for IT and HR. It follows that in this role, Mr Hind was responsible for both ensuring the company's financial systems were adhered to and, more than that, to implement, review and update the necessary financial systems to ensure they were fit for purpose.

5.5 Mr Hind was the head of a small finance department. I find it was very busy and quite possibly working at close to full capacity but I do not accept that there is evidence before me to support the contention that it was under resourced or that roles and responsibilities were being manipulated to undermine Mr Hind. In particular, if it was operating at the volume of work as was suggested before me, it seems more likely than not that the first area of work to fall away would be such tasks as unexplained payment requests to be made there and then, as is central to this case.

5.6 I find payments by the Respondent company follow an established system. The finance manager would process the payment through the various systems but Mr Hind would authorise them. There were technical systems to adhere to in respect of how the transaction was accounted for and how it was caused to be paid between banks. I was told by Mr Hind, and accept, that he applied a process of due diligence checks in respect of payments going

out of the business which I find was central to the obligations he had. That would include matters such as whether the payment was due, either at all or at that time, whether it was accounted for against an invoice or purchase order etc., and whether anything about the demand ought to raise any queries or concerns. These I find are all common features of basic commercial financial management.

5.7 On 15 April 2019, at 15:04 the Claimant received an email from the email address "emailhomee@virginmedia.com". It was styled to display a name, and actually appeared as "Robert Willey<emailhomee@virginmedia.com>".

5.8 The subject line was simply "John". The body of the email read:-

Hi John, what's the bank cut off time for outgoing payments, i have a payment i need you to process today

Regards,

Robert

5.9 I accept Mr James' evidence that there was an established quality standard applied to internal emails. One aspect of this was that individuals were required to give a clear and concise subject line and the culture was that if someone failed to do so, they would be challenged about it. His view was that a subject line simply stating "John" would not have met that internal standard and was not something that Mr Willey would do. Nor did he regard the form of address of "*Hi John*" as consistent with Mr Willey's usual style.

5.10 I find Mr Hind did notice the email address was not Mr Willey's work email address. Rather than that raising any suspicions, he assumed that this was his personal email address. Mr Hind accepted that Mr Willey had never corresponded by email with anything other than the Respondent's official work email system. He had not seen this email address before. One reason that Mr Hind allowed himself to form this assumption was that he knew that Mr Willey was at a funeral on the afternoon of 15 April. It is not clear to me why that should mean he would use a personal email rather than his work email. I was not told that there was any technical obstacle to logging into the official email account. On the balance of probabilities, if it was possible to log into any account remotely, it would also have been possible to log into the work account.

5.11 Mr Hind made a second assumption arising from the fact of Mr Willey was at a funeral. That was that Mr Willey was not contactable. I accept this was a decision he came to although the logic of it seems flawed in two respects. The first is that whilst it may not have been appropriate to initiate contact with Mr Willey in all but a true emergency, on this occasion he believed Mr Willey was making contact with him, apparently on a business issue. Secondly, Mr Hind believed he had in fact replied to Mr Willey on two occasions. If there was such an open channel for communication being used, it was available to convey any queries about what this payment was for, who it was to and why it was so urgent. The fact he was at a funeral does not, in those circumstances, explain why any of the obvious queries were not raised when Mr Hind believed he was in fact contacting Mr Willey that afternoon.

5.12 In addition, there is another reason why no such queries were made. Mr Hind made clear on numerous occasions during his evidence that whatever steps he took with other payments, he did not apply any due diligence to requests for payment where Mr Willey was involved. This was a conscious and positive decision on his part. Mr Willey had requested one off payments in the past although what I have before me suggests that such payments had only ever been to existing payees known to the company.

5.13 I did not hear from Mr Willey, but the evidence I did hear about him and the management of his company was such that it seems to me unlikely he would not have already known payments could be made on the day. The fact of the apparent question is itself a potentially curious fact that might have raised questions. I find the fact that the actual cut off time for daily payments was 5 minutes to midnight, as opposed to, say, a point in time during the afternoon, was itself significant and reinforces my view that this would have been something that was known to Mr Willey to such an extent that Mr Hind ought to have wondered, or at least been surprised, why he was asking such a question.

5.14 Mr Hind replied to the email at 16:06 simply stating: -

Hi Robert,

23.55 for single faster payments.

Kind regards

5.15 That he entered the technical timing suggests he did not interpret the request for a cut off time to have related to the ability of the staff in the finance department to actually make the arrangements for the payment. For example, such as might have prompted a response that “the team needed to know the details by 5:30 pm.”

5.16 A further email was then received by the Claimant at 16.13. It read: -

OK John,

Please process the payment straight away so that we are sure that it's in the recipients bank account by the end of the day

Here are the details

5.17 It then gave details of the account name and number, a reference to quote and an amount to be paid of £6,225.00. It concluded with the request: -

Please send me the confirmation once the payment is done

5.18 I have no evidence of any reconciliation with any invoicing or budget head or any other financial controls which would have either identified the purchase order or invoice to which this payment related or, if it was outside the usual commercial flow of money in and out, to identify how this payment would be treated in the company accounts. I find there was no such reconciliation. This was an unusual payment, out of the ordinary systems. It demanded a payment by electronic transfer to a bank account that was not already entered on the Respondent's systems. It had to be set up as a new payee.

5.19 I find Mr Hind passed the request to his Finance Manager, Mr Vasey. Mr Vasey questioned what it was for. Mr Hind simply responded that he did not know.

5.20 The Claimant authorised the payment to be paid. At 17:28 he sent an email to Mr Willey confirming that the sum requested had been paid. For some reason, that confirmation email was sent to Mr Willey's official email address, as opposed to replying to the address that Mr Hind had been corresponding with already that afternoon. The email simply stated: -

Ergonom have been paid £6,225 by a single faster payment.

Kind regards

5.21 Mr Hind then left work for the day. Two matters arise from the fact this email was sent to Mr Willey's official email address. The first is that the scammer was still waiting for confirmation that the scam had succeeded. That person emailed Mr Hind again at 17:53 saying: -

Hi John,

You didn't acknowledge the receipt of my email, please confirm if the payment has been done.

5.22 Of course, Mr Hind did not see this until he returned to work the following morning. At 8:40, he again emailed Mr Willey on his official work email, forwarding the confirmation email he had sent the previous evening, and stated: -

Hi Robert,

Please see email below that was sent at 17.28 yesterday.

5.23 The second matter is that Mr Willey was himself back at work the following morning and now had both emails from Mr Hind confirming that a payment had been made for something that he knew nothing about. It quickly became apparent that the Claimant and the Respondent had been the victim of a scam.

5.24 Mr Hind is critical of both Mr Willey and Mr Vasey for not coming back to him or further checking the bona fides of this demand for payment. It is hard to see why the responsibility for that checking should fall on either of them when the Claimant as the Finance Director has not undertaken any such due diligence and when the payment had already gone by the time Mr Willey learned of it.

5.25 For completeness, I record the Respondent's response to the situation. A disciplinary investigation was launched. Mr Hind was invited to a disciplinary hearing that took place on 26 April 2019 chaired by Mr Dickinson. Mr Hind faced an accusation of gross misconduct in that he caused £6225 to be paid to an unknown bank account without making the necessary due diligence checks. Mr Dickinson concluded after an adjournment that the Claimant's actions were unacceptable and relied on the negligence and loss of confidence as being sufficient to terminate the Claimant's employment without notice. The Claimant's appeal was dismissed. Within his arguments at these hearings, the Claimant raised his workload, the fact that this was a mistake not a deliberate act, that another employee had caused a cyber-attack the previous year and had not been dismissed and that the penalty was too harsh.

5.26 I was told that following the Claimant's dismissal, the Respondent received a partial refund from its bank because of the scam.

6. The Law

6.1 The relevant law is well settled. The Respondent must satisfy me to the civil standard that the Claimant has acted in a manner which is sufficient to repudiate the contract. It is not a question of whether it, or its agents, acted reasonably in reaching the conclusion to terminate without notice. Nor is it about whether the Respondent could dismiss Mr Hind, it is about whether it could dismiss him without notice.

6.2 In deciding that question, the test as to whether the Claimant has acted in such a way was laid down in **Neary v Dean of Westminster [1999] IRLR 288 (Special Commissioner)** and subsequently approved by the Court of Appeal in **Briscoe v Lubrizol Ltd IRLR 607**. That is that the conduct: -

“must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment”

6.3 Mr Gould, for the Respondent, also relied on **Laws v London Chronicle (Indicator Newspapers) Ltd [1969] 1 WLR 698** as authority for the proposition that, in the employment context, repudiatory meant sufficiently fundamental; on **Andesokan v Sainsbury's Supermarkets Ltd [2017] EWCA Civ 22** for the proposition that in determining what is sufficiently fundamental, regard should be had to the damage caused to the parties' relationship; and on **Aardron v Sussex Partnership NHS Foundation Trust [2018] EWHC 3157 (QB)** for the proposition that very considerable negligence may equally lead to irreparable damage to the relationship. All were useful and informative. None fundamentally altered the question posed above save to illustrate that the test requires me to have regard to all the relevant factors in the case before me.

7. Discussion and Conclusions

7.1 There is no dispute that Mr Hind did what he is accused of. He caused the payment to be made to a scammer, albeit labouring under the impression that it was on Mr Willey's instruction. The real issue is whether that conduct is such as to amount to conduct which repudiates the contract of employment, particularly where the issue is one of ongoing trust and confidence.

7.2 In answering that, there are a number of factors which I have concluded are not directly relevant. Firstly, part of Mr Hind's challenge before me has been to identify certain failures in the employer's own disciplinary procedure prior to the dismissal decision. That is not, in itself, of any assistance in deciding the nature and effect of the conduct relied on as amounting to a repudiatory breach. Similarly, the suggestion of a disparity of treatment is also not only of no direct relevance, but is potentially undermining of the Claimant's case as it relies on the existence of another case of misconduct that could have led to dismissal. Even if I were of the view that both the Claimant and his comparator were both guilty of the essentially the same breach, but only the Claimant was dismissed, that becomes a question

of fairness at best. That is not before me today. Turning it on its head, it is of no assistance to say that the employer should and could have chosen to affirm a contract on the face of a repudiatory breach by an employee. There is no cause of action (outside the analogous situation in a statutory claim of unfairness) that an employer failed to waive a breach and affirm the contract.

7.3 That the sanction of dismissal was too harsh is of no relevance insofar as it is considered as a manifestation of a response available to a reasonable employer if there is otherwise the repudiatory breach. It may, however, be relevant insofar as it is another way of expressing the point that there was no repudiatory breach.

7.4 Of the various relevant factors engaged, I take as the starting point the role Mr Hind held at the company and what it could expect from him in that role. The Respondent relies on section 174 of the Companies Act 2006 as a means of informing the standard to be applied to the legal test. It sets out the standard of reasonable care, skill and diligence of a company director. Which provides: -

(1)A director of a company must exercise reasonable care, skill and diligence.

(2)This means the care, skill and diligence that would be exercised by a reasonably diligent person with—

(a)the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and

(b)the general knowledge, skill and experience that the director has.

7.5 It seems to me that as helpful as this may be to indicate the level at which someone like Mr Hind operates within a company, it does not add anything to the contractual position the parties had put themselves in through the express terms agreed in the service contract or, more generally, the reasonable expectations it had of someone in the role of finance director. There was a high level of confidence placed in the Claimant within his role. This is not a clerk or junior manager. I have to conclude the seniority and high expectations placed on the Claimant weigh against him. His responsibility was not only at the operational level to authorise payments and account for them, but to oversee the financial systems. Financial security being central to any system of financial control. The company placed in him the responsibility for ensuring sufficient systems were in place to meet those expectations and that they would be followed.

7.6 I accept that both the sum involved and the question of whether it was recovered have some relevance, although do not weigh heavily. In this case the sum itself was not insignificant. It certainly could not be said to be anywhere near a *de minimis* figure. Whilst a large proportion of the sum was subsequently recovered, I am not satisfied that could have been reasonably foreseen that that would happen before the Claimant was actually dismissed. Moreover, the nature of concern is not simply the loss of money, but the circumstances in which it was lost. That would exist even if the scam was avoided at the last minute. To that extent, the scale of any loss and fact or otherwise of its recovery are peripheral to the failings which allow it to arise.

7.7 The circumstances of the scam are where Mr Hind's submissions potential gain the most traction. He was a victim of a fraud. The news is full of examples, often involving intelligent and tech-savvy individuals who still find they have allowed substantial sums to be handed over to scammers. This was, at one level, a sophisticated scam in that it required the scammer to research the targeted company and identify the names of two directors who might well engage in the sort of email exchange then conducted. It also required an email address to be formatted in such a way as to convey the impression it was from Mr Willey. At another level, however, it was very primitive and had Mr Hind and Mr Willey both been at the office, it would likely have been foiled in an instant. Who knows how many other similar emails have been initiated by this scammer and failed but, like many scams, there only has to be one attempt which gets through to make it worthwhile. There is no evidence before me to suggest there was any inside knowledge behind this scam but the fact Mr Willey was away that afternoon was clearly a factor in why it succeeded. On that day, in that busy office, the scam was able to succeed. Mr Hind clearly did not intend this to happen. But there are factors why I have reached the conclusion that Mr Hind's actions that day do amount to a repudiatory breach which entitled the Respondent to terminate without notice.

7.8 Firstly, there were numerous warning signs sufficient to prompt some level enquiry, if nothing else than at the level of questioning that Mr Vasey instinctively asked. The fact that he asked the obvious question is itself evidence that the circumstances were unusual. The fact that this was a payee that was not previously known to the company only served to amplify the concern that should have been present. I remain without a satisfactory explanation as to why that, and other obvious questions, were not asked of Mr Willey in any of the emails that were believed to have been sent to him that afternoon, notwithstanding his presence at a funeral and notwithstanding the fact that Mr Hind was aware that this was not an email address he had previous knowledge of. Whatever the state of resourcing in the office at that time, I am unable to conclude that there was such a pressure of work to deflect from these obvious issues and explain what happened. In any event, we then come to the key issue which is that there was a deliberate decision not to undertake the due diligence that otherwise would have accompanied such a request. That was a positive choice of Mr Hind. There may be a dynamic in the background as to why Mr Hind chose to operate in that way with Mr Willey but that does not diminish the obligation he had to the Respondent company under both the contract of employment and the statutory office that he held. The evidence did not permit me to find he was acting under any sought of compulsion that put him at odds with his contractual duties. I do not regard the practice adopted of not challenging Mr Willey to be exculpatory, in the way Mr Hind did when advancing his case. It was a failing which this scammer, no doubt unwittingly, was able to exploit. Without that failing, the scam would have foundered. I cannot ignore the fact that the failings in question were not merely peripheral to Mr Hind's role, and the confidence placed in him by the employer, but were central to it.

7.9 It follows that the Respondent was not obliged to give Mr Hind notice of termination. In this case that arises in one of two ways. Either the circumstances fell within clause 14.2.6 of the contract and thereby constitute one of the situations anticipated by the parties as entitling the employer to terminate without notice or, in any event, as a matter of common law, by

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accepting the repudiation of the contract the Respondent was released from its own obligations under it, including giving notice of termination.

EMPLOYMENT JUDGE R Clark

DATE 3 January 2020

JUDGMENT SENT TO THE PARTIES ON

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AND ENTERED IN THE REGISTER

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FOR SECRETARY OF THE TRIBUNALS