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EMPLOYMENT TRIBUNALS

Claimant		*Respondent*
Mr S Ingham	**AND**	**Go Modern Limited**

HELD AT: **London Central** **ON:** 10 March 2020

BEFORE: Employment Russell

Representation:

For Claimants: Mrs R Hedgkin, of Counsel
For Respondent: Mr Williams, Solicitor

JUDGMENT

1. The Claimant was removed as a Statutory Director of the Respondent on 29 July 2019. He resigned as an employee on 28 September 2019 with immediate effect. He did so voluntarily notwithstanding significant tensions with the Respondents within the Respondents business. But he was not dismissed in accordance with s.95(1)(c) and/or s.136(1)(c) Employment Rights Act 1996.

2. In consequence the claim of unfair and wrongful dismissal fail and are dismissed.

3. The Claimant's unauthorised deduction of wages claims succeeds. He was entitled to a salary of £10,105.25 (gross) per month and this is owed for the month September 2019 less tax and national insurance with the net figure being due and payable to him by the Respondent of £5,985. The respondent is ordered to pay this sum.

REASONS

Background

1. The Claimant had been a Director of the Respondent company since or soon after its foundation around 1 June 2006. The Respondent company specialises in the sale of modern luxury furniture to customers around the world. The only Directors until February 2019 were the Claimant and Tina Mahony. The Claimant was removed as a Director after some years of tension between him and Ms Mahony on 29 July 2019. The company in general meeting passed an ordinary resolution to effect the removal due to the support of Ms Mahony by Paul Heffner who was made a Director of the Respondent company on 20 February 2019. Both Mr Heffner and Ms Mahony gave evidence for the Respondent with the Claimant being the only witness for his claim. He remained an employee for two months after being removed as a Director albeit these were turbulent times. He still remains a 35% minority shareholder. Neither the Claimant or Ms Mahony had written contracts of employment. The apparent reason for this is that because they were Directors they did not think they needed one in contrast to less senior employees. Obviously, this was an oversight because they were both employees but in consequence the terms and conditions of the Claimant's employment were and remain equivocal. As a result of being removed as Director he claims his managerial duties were also removed and because of this and other alleged fundamental breaches of contract by the Respondent the Claimant resigned in writing on 28 September 2019 claiming constructive and unfair and wrongful dismissal (wrongful dismissal as he was not paid notice pay). He also claims unpaid salary of just over £10,000 for September 2019.

2. The Respondent denies the alleged breaches and claims the Claimant voluntarily resigned and that the non-payment of September pay reflects an agreed reduction in pay for the Claimant for and from August 2019 and in fact the Claimant had been over paid when he resigned in breach of contract (because he refused to work out his notice) on 28 September 2019.

3. I heard submissions from Mr Williams the solicitor for the Respondent and Ms Hodgkin, Counsel for the Claimant and these are my findings of fact:

1. The Respondent was at all material times in breach of s.1 of the Employment Rights Act 1996 by not providing the Claimant with minimum written particulars of employment. The lack of these however means I cannot make any clear findings of fact as to the Claimant's specific role and job duties albeit accepting the Claimant's contention that he worked in a senior role with significant finance and customer responsibilities even though many of the roles he handled were in collaboration with other Directors and employees.

2. The disagreement between Ms Mahony and the Claimant was deep rooted and entrenched and got worse over a number of years prior to the Claimant's departure. Again, it is difficult to determine where fault lies on this and I find it unnecessary to do so, what is clear is that it

lead to the Claimant's removal as a Director. Mr Heffner not only supported that resolution but initiated it. But it is clear from the evidence he did not always agree with Ms Mahony and I accept his evidence that he independently believed the Claimant was not working collaboratively with the other Directors and he acted accordingly through what he believed were the best interest of the business even though the Claimant obviously disagreed. In any event whether the removal was justified or not I find that the removal of the Claimant from his office as a Director was lawful.

3. At the internal meeting of 4 July 2019 which has been transcribed by the Claimant (but without the Respondent disputing the veracity of the transcription) the Respondent showed surprising ignorance of the Claimant's contractual position as an employee. Whilst the Respondent is a small company Ms Mahony and Mr Heffner are both experienced individuals and I would have expected them to be well aware that in addition to being a Director the Claimant was also an employee and should have received a written contract of employment. And I would have expected Ms Mahony to know that even if there was no written contract of employment there was still a contract in place by virtue of a verbal agreement. Employment over a number of years, in fact from 2006. Turning to the meeting itself however, I find that the Respondent expected and hoped the Claimant's removal as the Director would lead to his total exit from the business, including the sale of his minority shareholding by the end of July. It was not to be and this left a vacuum as to what role the Claimant was to take. I find that the Respondent may have preferred the Claimant to leave but did not orchestrate this with that end game in sight. They could have dismissed him as an employee first and then removed him as a Director as might be more normal practice. But they did not. Whilst they removed certain tasks from the Respondent e.g. bill payment and collection and contact with suppliers causing him understandable embarrassment and frustration, the Claimant did continue to be regarded by the Respondent as a good salesman. And the Respondent did, I find, envisage him staying on as an employee albeit on a less senior basis by agreement and albeit as stated above they would probably have preferred for him to have left.

4. It is clear that the working relationship started to worsen after the Claimant's removal as Director, perhaps understandably. There is fault on both sides here. The Claimant was reluctant to come in to the office and/or attend meetings to discuss any revised role and the Respondent was unable or unwilling to prioritise setting out a proposed role for him. On balance I think the Respondent was more at fault than the Claimant but what is clear it was certainly an unacceptable and undermining process for the business and for the Claimant who spent most of this period at home perhaps unsure about what role he was to have and what job responsibilities he was to undertake. During this time I find Ms Mahony believed that as she was the founder of the business she and Mr Heffner could bypass other Directors and shareholders and

they admitted in evidence that they called meetings and made decisions without always involving Co-Directors and/or informing the shareholders of what they were intending to do or were actually doing. They admitted in evidence that they made some mistakes and procedural oversights. However, I cannot find, addressing the three bullet point examples by the Claimant in his letter of resignation to the Respondent, that the Respondent was in fundamental breach of contract in the way that the Claimant specified in that letter of 28 September. There had been at least two letters from his solicitor to complain about the company's conduct but the Claimant's complaints on 28 September were he had been removed as a Director and claiming that his role had been unilaterally and prejudicially varied and that the company had followed a disciplinary process in an unfair manner. Dealing with each of these in turn:

1. Removal as a Director. I have already found that this was undertaken in accordance with company law by way of an ordinary resolution and in fact the Claimant through his representative, did not dispute this.

2. Varying the Claimant's role. This is more complicated and inevitably it is going to be a problem once a senior employee is removed as a Director because in practice the job can never stay the same for obvious reasons which is why such a decision i.e. removing someone as a Director, frequently leads to the individual leaving the business. But there is clear evidence that the Claimant was content to discuss other roles and to remain and indeed on a lesser salary and I do not accept his contention that he was left only with menial tasks as a result of losing his managerial role (to the extent that he did). Should he have been offered something specific in this period of what was two months? Almost certainly so. But the Claimant's non availability and failure to embrace the possible healing process as well as the Respondent's undoubted lack of focus or organisation means there is once again fault on both sides and I do not accept that the meeting of 4 July 2019 shows that the Respondent could not envisage the Claimant staying on if he wanted to do so. I know that they talked about him leaving at the end of July but I am satisfied that this referred to him being removed as a Director and the possibility of an exit which the Claimant had raised. I do not criticise the Claimant for this because it is natural that he would want to consider his options but that was the prime reason for the discussion focussing on the possibility of the Claimant exiting the business completely. But the main reason why I cannot say that the Respondent acted unreasonably by way of a fundamental breach of contract here is that the Claimant's duties and responsibilities were not written down other than by the Claimant himself when he (in good faith) tried to set

out his role as he understood it. However, one of the reasons why this was necessary and a surprise to the Respondent is that there was not anything written down about his job duties and I find it difficult to express what they were. If the Respondent had written to the Claimant requiring hm to accept a clearly lesser job and on a lesser salary and the Claimant had refused this he would have been at liberty to do so and pursue a material claim but I find that such negotiations were legitimately still continuing. I know for instance at one stage the Claimant asked if he could be considered for part time work. He had been willing to stay on. The dialogue was sometimes limited but it was constructive. The Claimant was entitled to feel frustrated of course but not entitled to say the Respondent was fundamentally breaching his contract of employment given the fact, in respect of the proposed variation in job duties/terms, there had been no conclusion to the discussions concerning any future role that he may have and the certainty as to the role he had had.

3. Disciplinary process. It is true that the original invite to a disciplinary meeting on 17 September 2019 is shockingly short on detail but this hearing did not actually take place. Instead the Respondent reverted to calling an investigatory meeting in anticipation of a possible disciplinary hearing, but we do not what the outcome of that may have been. The Claimant's Counsel talks of accumulation of events but if that is a reference to the Respondent inviting the Claimant to an investigatory meeting on 26 September immediately before the Claimant resigned I do not accept this to be a fundamental breach of contract and/or a "final straw" by way of a catalogue of unacceptable conduct from the Respondents. The Claimant feels he had a solid defence to all and any allegations that might have been put to him and maybe this was the case in which case he should have gone along to the proposed meeting on 4 October 2019 to say as much. The poorly drafted letter by the Respondents of 17 September 2019 reflects a flawed procedure, if this had been a straight forward unfair dismissal claim but first the Claimant needs to show that he had been dismissed. If this process had led to the Respondent dismissing him then it would have brought events into focus as part of an unfair dismissal claim where dismissal could not be disputed but before it happened the Claimant resigned.

4. For some reason the Claimant did not mention in his letter of resignation his reduction in pay. I am asked to accept by his representative that he had already expressed his concern about this but I find that this is not a straight forward issue. Both the Claimant and the Respondent for a while were paid by Director's loan, effectively an advanced dividend. This is not desirable in

respect of employees (who should be paid salaries as emoluments) even if it is not illegal and in any event, it was then changed and I find it was then Ms Mahony who insisted on salary level being at £10,100 plus per month. This was to ensure that she had taken sufficient net income to pay for her own outgoings. The Claimant made it clear that he thought this was unsustainable, for instance in a well constructed and fairly presented email of 31 May 2019. He said then "I believe the figure for our salary should be £2,000 or £3,000 per month" and "I will ask Sopher & Co [Accountants] to set a figure at £4,500 per month from 1 June on". At another time he said that perhaps £5,000 a month might be sustainable thinking of a gross pay, however it was Ms Mahony who prevented this from happening and I further find:

1. The Claimant would have accepted a much lower salary of perhaps £3,000 as the Respondent claimed he had agreed to
2. This did not happen because Ms Mahony refused to countenance it
3. Her and the Claimant's salary were the same at all material times
4. As at the end of July 2019 the Claimant's salary was £10,100 per annum and he had not agreed to a reduction
5. The Claimant had not agreed to a lower salary, more specifically the Claimant had not agreed to a lower salary at the time that he was removed from his Directorship nor did he do so afterwards e.g. in August 2019
6. The Claimant therefore benefits from Ms Mahony's insisting on a larger salary of over £10,000 per month
7. When the Respondent sought to vary the Claimant's pay in August 2019 (albeit paying him for that month) they did so unilaterally. The Claimant had not agreed and as the date of his resignation his pay was legitimately £10,100. The Respondents argument to the contrary is unreasonable, fanciful and without any substance.
8. The Claimant did not refer to this in his letter of resignation because although concerned about what it was and should have been paid he also knew that £10,000 plus was not expected and an unnecessary high payment for him and Ms Mahony to take to protect the company and their own and shareholders as well employees. He would have been content with a lower sum

5. The Respondent is a small company and so perhaps it is understandable that for instance they do not have a full disciplinary and grievance procedure/handbook as the Claimant's lawyers had asked for and that they failed to deal effectively and fairly with the Claimant. This extends to their failure to even acknowledge the grievance lodged by the Claimant when he resigned. I find their conduct damaged the employment relationship and this was the likely result of the Claimant being removed as a Director however justifiable that may or may not have been. But this is not a case where the Claimant has been pushed out as an employee, even if that was the end result and to the extent that this was to happen it had not happened as at the end of September 2019. In other words it was the Claimant's choice to resign and leave at that time and not a demand by the Respondent.

Legal Findings

6. In her list of issues the Claimant's Counsel claims there were eight breaches of conduct and or together amounting to a fundamental breach of contract by the Respondent but for the reasons given above whilst criticising the Respondent for their conduct I found none of these (other than perhaps the unilateral reduction in pay which in cases such as Buckland v Bournemouth University Higher Education Corporation 2018 (Court of Appeal) I am reminded "almost always if not always is repudiatory ("unless consented to") amount to a fundamental breach nor was there a final straw doctrine applied at the time that the Claimant resigned.

7. I apply the Malik v BCCI (1997) principals in looking at whether the implied term of mutual trust and confidence has been fundamentally breached and find it has not. It is clearly established in cases such as Woods v WM Car Services Peterborough Limited (1981) that an employer cannot without reason and proper cause conduct themselves in the manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. This refers to conduct going to the heart of the employment relationship however and any conduct which is mildly or moderately objectionable is not enough to show damage to the employment relationship sufficient to justify a constructive dismissal.

8. On the pay point the Claimant had been paid for August 2019 and it was only for September 2019 that he had not been paid but he resigned only a few days after that pay should have been posted into his bank account and he did not even refer to it in his resignation letter. I found he did not agree to a reduction in pay although he may well have done months before but if that had been his position (i.e. that he was resigning because of the failure to pay him for September) he should have objected more clearly and given the Respondent perhaps a reasonable chance to remedy the breach before determining that he could not continue. And when the Claimant resigned on 28 September the second limb (in respect of the unilateral deduction in pay), of a repudiatory breach – that such breach was an effective cause of the Claimant's resignation – is not met. I found that he did not resign because of that non payment.

9. In consequence my judgment is that there was no constructive dismissal under s.95(1c) and or s136(1c) of the ERA 1996 and as the Claimant refused to work his notice period his wrongful dismissal fails as well. He is not entitled to notice pay. However, as I found he was entitled to £10,000 plus salary his unauthorised deduction for wages claim does succeed and I award him this sum. His entitlement is obviously to a net amount which is £5,988 and it is egregious that he has had to wait so long for the payment of this contractual debt. The Respondent is ordered to make that payment of £5,988 to the Claimant but with tax and national insurance paid to the revenue to reflect the non payment of September pay. In all other respects the Claimant's claims fail.

Employment Judge Russell

Dated: 20 March 2020

Reasons sent to the parties on:

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For the Tribunal Office