



EMPLOYMENT TRIBUNALS

Claimant: Mr. J Wilson

Respondent: Mediaworks UK Limited

Heard at: Newcastle-Upon-Tyne

On: 20 August 2020

Before: Employment Judge A.M.S. Green

Representation

Claimant: Mrs S Wilson – the claimant's wife

Respondent: Mr. P Scope - Solicitor

RESERVED JUDGMENT

The claimant's claims for breach of contract (notice pay), unlawful deduction from wages and holiday pay are dismissed.

REASONS

Introduction

1. Because of the Covid-19 pandemic, the parties agreed to a remote video hearing using the CVP platform. After an initial delay of approximately one hour to manage access problems, I heard evidence from the claimant, Mr. Mark Rutherford, the respondent's Chief Financial Officer, Mr. Andrew Blenkinsop, the respondent's Creative Director and Mr. Gary Smith, the respondent's Chief Operating Officer. Each of the witnesses affirmed their evidence and adopted their witness statements.
2. Throughout the hearing the parties and the Tribunal used a joint digital hearing bundle. Mr. Scope provided a written skeleton argument which he adopted as part of his closing oral submissions. Mrs Wilson made closing oral submissions. To further the overriding objective, I carefully explained the procedure to Mrs Wilson because she is not a legally qualified representative and I offered her some extra time to prepare her closing submissions after hearing Mr. Scope's closing submissions. She acknowledged but declined that offer as she believed that she did not need

any extra time. Given the nature of the hearing, I made sure that there were regular breaks during the hearing. I am grateful to Mrs Wilson and Mr. Scope for the efforts that they made to ensure that this video hearing ran smoothly.

3. After I heard the evidence and submissions, there was insufficient time for me to deliberate and to provide a decision with oral reasons on the day of the hearing, so I decided to reserve my judgment.
4. In reaching my decision, I have considered the oral and documentary evidence. The fact that I have not referred to every document produced in the bundle should not be taken to mean that I have not considered it.
5. For ease of reading, I refer to the claimant by his name and to the respondent as Mediaworks.

The claims

6. Mr. Wilson claims the following:
 - a. Mediaworks made an unlawful deduction from his wages and/or breached his contract of employment by failing to pay him his December 2019 salary for the period up to the date when his employment ended. He claims his unpaid salary for that period.
 - b. Mediaworks breached his contract of employment by terminating it summarily on 13 December 2019. He claims damages, including lost earnings up to the date his employment would have ended had Mediaworks not terminated his contract (which Mr. Wilson says was 27 December 2019).
 - c. Mediaworks breached his contract of employment and/or made an unlawful deduction from wages by failing to pay him two days' pay due on termination in respect of accrued but untaken holiday. He appears to be claiming that is entitlement to pay in lieu arose under his contract of employment rather than by virtue of the Working Time Regulations 1998 (as his contractual entitlement appears to have been more generous than his statutory entitlement).
7. Mr. Wilson must prove his claims on a balance of probabilities.

The issues

8. These are the following issues that the Tribunal must determine in respect of Mr. Wilson's claims:
 - a. Did Mediaworks make an unauthorised deduction from Mr. Wilson's wages in accordance with the Employment Rights Act 1996, section 13 ("ERA") and if so, how much was deducted? Alternatively, did Mediaworks breach Mr. Wilson's contract of employment in failing to pay him one month's notice.

- b. Did Mr. Wilson fundamentally breach his contract of employment by refusing to work. Mr. Wilson's position is that he was not required to work as Mediaworks had put him on garden leave for the period of his notice. Mediaworks position is that they did not put Mr. Wilson on garden leave but simply required him to work his notice from home. They contend that Mr. Wilson refused to work or did not make himself available to work and, consequently, fundamentally breached his contract of employment. He was not able and willing to perform work that was offered to him. Mediaworks must prove this on a balance of probability and that they affirmed the repudiatory breach of contract of employment by Mr. Wilson prior to his dismissal.

Findings of fact

9. Mr. Wilson has been a web developer for 24 years across a broad scope of industries both in-house and within agencies.
10. Mr. Wilson joined Mediaworks on 1 February 2018 as a Senior Web Developer. Mediaworks is a digital marketing agency. It has an office in Gateshead.
11. Mr. Wilson's terms and conditions of employment were set out in a letter on Mediaworks' letter paper dated 10 January 2018 [38]. There is no dispute between the parties that this letter constituted Mr. Wilson's written contract of employment. Mr. Wilson countersigned the letter on 22 January 2018 [46]. For ease of reading, I refer to this letter as the contract of employment.
12. The following provisions of the contract of employment are relevant to the issues:
 - a. Paragraph 3.1 says that Mr. Wilson's normal place of work was at Mediaworks' office in Gateshead. However, the contract of employment also provides that Mr. Wilson might be required from time to time to visit and work at such other locations and for such times as Mediaworks considered necessary for the proper performance of his duties. This expressly included their London office. It is reasonable to infer that Mediaworks could also require Mr. Wilson to work from home.
 - b. Paragraph 7.1 says that Mediaworks' holiday period runs from 1 January to 31 December. Paragraph 7.2 says that Mr. Wilson was entitled to 25 days' paid holiday during each holiday year.
 - c. Paragraph 9.1.1 says that Mr. Wilson was required to give Mediaworks one calendar month's notice of termination of employment.
 - d. Paragraph 9.3 provides that Mediaworks was entitled to dismiss Mr. Wilson at any time without notice or payment in lieu of notice if he committed a serious breach of his obligations as an employee, or if he ceased to be entitled to work in the United Kingdom.

13. The contract of employment is silent on the matter of garden leave. It does not confer an express right on Mediaworks to put Mr. Wilson on garden leave. Consequently, it is reasonable to infer that, at the time when the contract was made, the option of garden leave was not in the contemplation of the parties. Mr. Wilson was, however, contractually bound to maintain confidentiality during and after his employment (paragraph 16) and he was also subject to various post termination restrictions such as noncompetition/solicitation (paragraph 12).
14. Mr. Wilson reported to Mr. Blenkinsop in a development team of around 10 people. There is no dispute between the parties that Mr. Wilson was well regarded in his role. However, what is clear is that problems arose when Mr. Wilson was not promoted to the role of Head of Development. This position was given to Mr. Craig Bailey who was an external appointee. The relationship between Mr. Wilson and Mediaworks deteriorated thereafter despite efforts on both sides to agree a method of promoting a productive and workable working relationship between Mr. Wilson and Mr. Bailey.
15. Matters came to a head on 2 December 2019 when Mr. Wilson resigned and gave one month's notice. There are competing versions of the facts as to what Mr. Wilson would do during his notice period. Mr. Wilson believed that it was agreed that other than preparing a handover, he would not be required to work in notice because Mediaworks put him on garden leave. Mediaworks' position is different. They say that on 2 December 2019, it was agreed that Mr. Wilson would work from home on several outstanding projects. In other words, he would work his notice. They say that he was not put on garden leave.
16. Mr. Wilson's version of events is set out at paragraph 17 of his witness statement where he says that he felt forced to resign and hand in his notice which would mean that his last day of his employment with Mediaworks would have been 27 December 2019. He says that he spoke to Mr. Smith and told him that he was rejoining another digital marketing agency. He goes on to say that he made it clear that he was willing to work but he preferred it if he was not made to return to his current desk. At paragraph 18 of his witness statement he provides further detail of what he believes was agreed concerning his notice period. He says that because of the turbulent last few months, the sensitive nature of any current projects and the organisation that he was rejoining (i.e. a competitor) it was mutually agreed at a second meeting that both he and Mediaworks would both benefit if he completed a handover document at home and then served the rest of his notice on garden leave.
17. Mr. Wilson goes on to say in paragraph 18 of his witness statement that at the time of his resignation, he was working on an internal HR application which included highly confidential details of every internal 1-2-1 meeting, appraisals and records of positive and negative incidents for every staff meeting. At paragraph 19 of his witness statement, Mr. Wilson says that no further work on existing projects was agreed with Mediaworks. He claims that he was told that if there was to be any further communication it would be limited to being with Mr. Smith or Mr. Blenkinsop, given the circumstances of his resignation. He was given his work laptop to take with him on the understanding that he was to use this to complete the handover document and to communicate with Mr. Smith and/or Mr. Blenkinsop via the

usual channels which was his work email and instant chat using Microsoft Teams.

18. Mr. Wilson's narrative continues at paragraph 20 when he says that he left the office on 2 December 2020 with a smile on his face and his head held high. He says that he felt a huge weight had been lifted from his shoulders and he was ready to put what he describes as "this horrible experience behind me for a fresh start in 2020".
19. Mr. Wilson claims that apart from an email from Mr. Nick Tuck (a project manager at Mediaworks), which he received a couple of hours after the resignation meeting, he did not have any further communication with Mediaworks until he emailed Mr. Rutherford on 17 December 2019 [19].
20. Mr. Wilson claims at paragraph 22 of his witness statement that he sent Mr. Blenkinsop the "requested handover" on 3 December 2019. He goes on to say that he monitored his email and logged on to Microsoft Teams on a daily basis [86-93] but received nothing from Mr. Smith or Mr. Blenkinsop and he did not reply to emails sent from other project managers, as instructed. Mr. Wilson has not produced a copy of the handover because he claims that he no longer has access to his work email.
21. At paragraph 23 of his witness statement, Mr. Wilson says that he received a letter from Mediaworks on 14 December 2019 [74] stating their confirmation of termination of his employment and withholding his notice and holiday pay from 2 December 2019 onwards. He said this letter came out of the blue (i.e. it was unexpected).
22. Mediaworks's version of what was agreed at the second meeting on 2 December 2019 is different. At paragraph 18 of his witness statement, Mr. Smith says that Mr. Wilson came into his office at about 8:30 AM on 2 December 2019 and told him that he had had enough. The supposedly improved working relationship between Mr. Wilson and Mr. Bailey was no more than a façade. He goes on to say that Mr. Wilson stated that he was still unhappy, and he was going because he had another job. Mr. Smith states that he was disappointed because he believed that progress had been made. He goes on to say at paragraph 20 that Mr. Smith asked about his notice period to which he replied that he was required to give Mediaworks one month's notice but that he needed to speak to Mr. Blenkinsop to find out what the company was committed to from a project's perspective. Mr. Smith states that at that juncture, Mr. Wilson went out for a cigarette whilst Mr. Smith telephoned Mr. Blenkinsop.
23. At paragraph 21 of his witness statement Mr. Smith narrates that Mr. Blenkinsop came into his office and it was agreed that Mr. Wilson would need to finish off some work on the Efes and Hive Estates projects that week and he could work on the internal HR app up until Christmas. It is then narrated at paragraph 22 that Mr. Wilson returned to the meeting and joined Mr. Smith and Mr. Blenkinsop at which point they put their proposal for his notice period to him. Mr. Smith claims that Mr. Wilson agreed to this but because he was unwilling to work in the office he asked if he could work from home. This was agreed and Mr. Wilson took his company laptop home for that purpose. Mr. Smith says that at no point was it agreed that Mr. Wilson would be placed on garden leave.

24. Mr. Smith then claims at paragraph 23 of his witness statement that Mr. Wilson's departure was then shared with the team on the same day that he resigned and his role in the Efes and Hive projects was confirmed with the relevant project managers. He confirms that on 2 December 2019 Mr. Tuck contacted Mr. Wilson to confirm that he was working on the Hive project [60] and that Mr. Wilson confirmed the same afternoon that he was working on it and was seeking clarification on priorities with the backlog of issues on JIRA, Mediaworks's management system [59].

25. I do not accept that Mr. Wilson was placed on garden leave on 2 December 2019. Instead, it was agreed that he would work his notice, albeit from home. I have reached this conclusion for the following reasons:

- a. His contract of employment did not contain a garden leave clause. Furthermore, there is no evidence of any collateral agreement either in writing or verbally to suggest that Mediaworks ever contemplated putting Mr. Wilson on garden leave when he resigned.
- b. There was no evidence that Mr. Wilson ever produced the handover which he claimed was the only requirement that was imposed on him by Mediaworks. The only reference to the handover is in a text message exchange between himself and Mrs Wilson [58]. Furthermore, none of the witnesses for Mediaworks had any recollection of seeing or receiving the handover note that Mr. Wilson claims he sent, and Mr. Wilson has not produced the handover note. It is also noteworthy, that the only place where Mr. Wilson refers to the handover is in his witness statement and the text message. Nothing is said about the handover in his claim form. I think that it is reasonable to presume that he would have mentioned the handover as part of the narrative supporting his averment that other than the that one discrete task, he was being placed on garden leave. I also find it noteworthy that when Mr. Wilson responded to Mediaworks' letter of 14 December 2019 terminating his employment, nowhere does he mention the fact that all he was required to do after 2 December 2019 was to prepare and deliver his handover note. Mr. Wilson's response was set out in his letter of 17 December 2019; the letter is silent on the question of handover. Indeed, under cross-examination, Mr. Wilson accepted that the only place where he had mentioned the requirement to write the handover in the Tribunal documents was in his witness statement. I think that the reality was he was not asked to prepare a handover and he did not do so. The fact that he mentioned a handover in a text to his wife does not, in itself mean that such a document was written or required of him by Mediaworks.
- c. There were three people at the second stage of the meeting on 2 December 2019. They were the Mr. Wilson, Mr. Smith, and Mr. Blenkinsop. Mr. Smith and Mr. Blenkinsop were reliable witnesses and answered the questions they were asked and were neither vague nor evasive when giving their evidence. Mr. Blenkinsop's evidence in his witness statement corroborates Mr. Smith's account of what happened at that meeting. In particular, in paragraph 12 of his witness statement he narrates the fact that Mr. Wilson said that

he was resigning and had another job lined up. He goes on to say that Mr. Wilson was not prepared to join the team to complete his work and it was agreed with him that he could work his notice from home. Mr. Blenkinsop also corroborates what Mr. Smith said about the work that had to be completed. Furthermore, he categorically states that garden leave was not discussed or that he would not be required to undertake any work. He could take his laptop home with him because he needed it to complete his work.

- d. When Mr. Blenkinsop was cross examined, it was suggested that it was unusual to allow an employee to work from home when they were going to work for a competitor. The implication was that it was not credible. I disagree. I accept that in some circumstances, employees who resign and go to work for a competitor are asked to leave work immediately and they are placed on garden leave to protect the legitimate interests of the current employer. However, each case must depend on its own facts. In this case, the relationship with Mr. Wilson had generally been good and I accept Mr. Smith's evidence that he trusted Mr. Wilson to complete the work that he had been asked to do. The issue was not about the quality of his work but the fact that he did not want to work under Mr. Bailey and with the team members in the office. I also accept Mr. Rutherford's evidence when he said that whilst it was rare for an individual to work from home when they have resigned, this had been agreed with Mr. Blenkinsop and Mr. Smith and they trusted him to work from home. The question of going to work for a competitor was not a serious issue in Mr. Rutherford's mind. This was because although the company in question worked in the same industry and provided the same service to clients, Mediaworks worked for different clients of a different order of magnitude. The real issue was ensuring that Mr. Wilson completed his work on existing projects during his notice period and this would be facilitated by allowing to work from home.
- e. At 13:53 hours on 2 December 2019, Mr. Tuck sent Mr. Wilson an email [60]. The contents of that email are brief and to the point. Mr. Tuck asked Mr. Wilson "are you working on Hive today?". Nothing could be clearer. Mr. Wilson replied to that email on the same day at 14:01 hours to confirm that he was indeed working on Hive and asked whether there was any order of preference [59]. This contradicts Mr. Wilson's claim that he was only required to prepare a handover. It also illustrates his own belief that he was in fact required to continue to work. By this time, he had resigned and had given Mediaworks one month's notice. It also contradicts his claim that he was only to communicate with Mr. Smith or Mr. Blenkinsop.

26. I now turn to the question as to whether Mr. Wilson performed any work after he resigned. Under cross-examination, he was asked whether he did any work. He replied that other than preparing the handover, he did not work. That is a significant admission. When he was taken to the email that he sent to Mr. Tuck on 2 December 2019 [59] he admitted that he had not told the truth about working on the Hive project. He also accepted that he had given Mr. Tuck the false impression that he was working on that project. On his own admission, Mr. Wilson accepts that he was lying to Mr. Tuck.

27. On 4 December 2019, Mr. Tuck sent another email to Mr. Wilson at 07:53 hours seeking an update on Hive [62]. Mr. Wilson replied at 08:01 hours to say that he was still working on it but that he had not been well for the last few days and he would give him an update when he had something to show the client. Once again, this indicates Mr. Wilson's own understanding that he was required to work during his notice. This is not consistent with the idea that he was on garden leave and not required to work or to limit his communication to Mr. Smith or Mr. Blenkinsop.
28. On 5 December 2019, Mr. Tuck sent another email to Mr. Wilson at 14:03 hours [61]. He wanted to know how Mr. Wilson was getting on with Hive because the client was chasing again, and he really needed to give them an update on the same day. This suggests that he had not heard anything from Mr. Wilson and the matter was becoming more urgent. Under cross-examination, Mr. Wilson admitted that he did not reply to Mr. Tuck. He also accepted that this exchange of emails on 4 December 2019 contradicted his claim that the last time he communicated with Mediaworks prior to his letter of 17 December 2020 was 2 December 2020.
29. The fact that Mr. Wilson had lied to Mr. Tuck about working and this inconsistency about lines of communication significantly undermines his claim that he was put on garden leave or that he was not required to perform any work during his notice.
30. Mr. Wilson's inactivity understandably gave Mediaworks cause for concern and there was a review of their internal systems which was documented [80-93] (data sheets). This inactivity could damage their relationship with their clients. These data sheets show that the work was not completed by Mr. Wilson.
31. On 5 December 2019, Mr. Blenkinsop tried to contact Mr. Wilson via text message [70]. He wanted Mr. Wilson to update him on the Hive and Efes because they were getting chased. He also wanted to know if he was still working on the HR app. Mr. Wilson did not reply to that message. On 11 December 2019, Mr. Blenkinsop sent another text message to Mr. Wilson looking for an update and asked him to call him [70]. At that point, as narrated in paragraph 16 of Mr. Blenkinsop's witness statement, the Hive deadline had passed and the Efes deadline was rapidly approaching and they were left with no choice but to reassign the work to another developer.
32. On 12 December 2019, Mr. Smith told Mr. Rutherford that Mr. Wilson had not responded to the various attempts to contact him about his work projects. Mr. Rutherford decided that because of this, Mr. Wilson should be dismissed with immediate effect and wrote to him on 13 December 2019 to confirm that [74]. He made the decision after agreeing it with Mr. Smith and based it on the various unsuccessful attempts to contact Mr. Wilson since 2 December 2019 and the urgency of reallocating the projects he had been expected to work on. The letter stated, amongst other things:

Following your resignation on 2 December, I hereby confirm the termination of your employment with Mediaworks.

You are obliged, within your contract of employment, to give 1 months' notice of termination. As you have not attended work during your contractual period, we are entitled not to pay you for this time.

We have calculated your total number of working days for December to be 3 days, this figure also takes into consideration your holiday entitlement. Accordingly, your final salary payment will be made on 20 December 2019 and will cover the period 1 December to 4 December (this is inclusive of your 2-day accrued holiday entitlement).

33. The effect of the letter of 13 December was to terminate Mr. Wilson's employment with immediate effect and not pay him anything more than 3 days from 1 to 4 December 2019.
34. By a letter dated 17 December 2019, Mr. Wilson responded to Mr. Rutherford's letter [75]. He stated his belief that it had been agreed that he was on garden leave. In his letter, he also claimed that it was agreed that they would only be communication between himself, Mr. Smith, and Mr. Blenkinsop. I do not accept that as a matter of fact because subsequent communications passed between Mr. Wilson and Mr. Tuck. Furthermore, this was not a justification for Mr. Wilson not answering communications about his work that he received from other employees such as Danielle Palmer. The reasonable inference to be drawn is that Mr. Wilson simply chose to ignore emails which triggered Mr. Blenkinsop to text message him instead.
35. Mr. Blenkinsop replied to Mr. Wilson in a letter dated 20 December 2019 [77]. He denied that it was agreed that Mr. Wilson should be placed on garden leave. He stated that Mr. Smith and Mr. Blenkinsop had requested Mr. Wilson to complete further work prior to the end of December which was in progress at the time. Upon completion of that work, it was agreed that he could leave the business. The letter incorporated a table setting out details of the number of times when various employees attempted to contact Mr. Wilson about his work between 2 December 2019 and 11 December 2019. The total number of attempts is 11. The letter goes on to say that because of Mr. Wilson's failure to complete any of the agreed work and in the absence of any communication, it was decided to remove his access to Mediaworks' systems and to confirm termination of his employment. The letter goes on to say that since his resignation on 2 December 2019, Mr. Wilson had been absent from work without authorisation and was not entitled to receive payment for any period of unauthorised absence. He was only entitled to be paid in respect of notice if he was ready and willing to work.

Applicable law

36. Contracts of employment are only binding on the employer and the employee if they are supported by consideration. Consideration is something of value which passes between parties when the contract is performed. Thus, if A promises B that they will perform a service, that promise will only be part of a contract if A is to receive something of value in return, such as a fee. In employment contracts there are promises on both sides. The consideration for the employee's promise to work is

generally the salary paid by the employer (although the promise need not be monetary). Conversely, the consideration for the employer's promise to pay the salary is the work done by the employee. If the employee refuses to perform the work, there is a failure of consideration. The employer may, as a matter of contract law, withhold payment.

37. Under general contractual principles a breach of contract entitles the innocent party to sue for damages, but it does not always entitle the innocent party to terminate the contract. The right to terminate the contract arises where:

- a. The party in default has repudiated the contract (i.e. has indicated by words or conduct that he or she does not intend to honour future obligations under the contract); or
- b. The party in default has committed a fundamental breach of contract.

In practice, courts and tribunals do not always make a clear distinction between repudiation and fundamental breach in employment cases.

38. Where one party to a contract repudiates the contract or commits a fundamental breach of contract, the innocent party can either:

- a. Refuse to accept the repudiation or fundamental breach and affirm the contract (i.e. treat the contract as continuing); or
- b. Accept the repudiation or fundamental breach and treat the contract as discharged.

39. Mutuality of obligation is now generally regarded as a necessary element of the contract of employment as expressed in the decision of the House of Lords in **Carmichael and another v National Power plc 1999 ICR 1226, HL**. The concept of mutuality of obligation is usually expressed as an obligation on the employer to provide work and a corresponding obligation on the employee to accept and perform the work offered. Mutuality of obligation is a fundamental term of the contract of employment. It follows that breaching that obligation is material and goes to the root of the employment relationship. Breach of the obligation justifies termination of the contract by the innocent party. Thus, if an employee refuses to accept and perform work offered by their employer, they are in material breach of contract and the employer is entitled to terminate the contract (i.e. accept the repudiation or fundamental breach and summarily dismiss the employee).

40. If an employee continues to work during their notice period, they are entitled to be paid in the normal way. However, the employee must be ready and willing to work to secure the entitlement (ERA, section 88). If an employee is dismissed without notice (say for gross misconduct or fundamental breach of contract) they do not have the statutory right to be paid (ERA, section 91(4)). The only remedy would be to sue under the contract for wrongful dismissal.

41. I remind myself that an employee's voluntary non-performance of work removes any liability on an employer to pay them, therefore there is no

deduction of wages (Miles v Wakefield Metropolitan District Council [1987] IRLR 193 (HL)).

Applying the law to the facts

42. On the question of unlawful deduction of wages, Mr. Wilson failed to respond to Mediaworks' instructions to perform work during his notice period. In the process:
- a. He removed any obligation on Mediaworks to pay him. Wages were not due under contract of employment as Mr. Wilson provided no consideration. During his notice period, Mr. Wilson was entitled to be paid in return for his service. He was only entitled to be paid based on his "readiness and willingness" to work. He was neither ready nor willing to work. Mr. Wilson's voluntary non-performance of work removed any liability on Mediaworks to pay him, therefore there was no deduction of wages.
 - b. Mr. Wilson was in repudiatory/fundamental breach of contract by breaching the fundamental principle of mutuality of obligation and was not entitled to wages. He was offered work during his notice period which he did not perform. He had no intention of doing the work and admitted that he had lied to Mr. Tuck on the matter
43. Mediaworks was entitled to summarily dismiss Mr. Wilson because of his failure to perform the work agreed or in fact any work and the failure to respond to the multiple contact attempts made by Mediaworks. This was a serious breach of his obligation as provided for by clause 9.3 of his contract of employment. They have discharged the burden of proof in this regard.

Employment Judge A.M.S. Green

Date 26 August 2020