



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mr A Stanley

AND

Respondent
Cranleys Staffing Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Southampton (By video – CVP) **ON** 8 December 2020

EMPLOYMENT JUDGE GRAY

Representation

For the Claimant: In person

For the Respondent: Mr Colin Davison (Sole Director of Respondent)

JUDGMENT

The judgment of the tribunal is that the Claimant succeeds in his claim for breach of contract (notice pay) and the Respondent is ordered to pay the Claimant the gross sum of £1,083.

JUDGMENT having been delivered orally on the 8 December 2020, then sent to the parties on the 7 January 2021 and written reasons then having been requested by email dated 8 January 2021, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In this case the Claimant, Mr Stanley, brings monetary claims for breach of contract (notice pay). The Respondent denies the claim.
2. With the parties consent this hearing was conducted by video (CVP).

Background to the claim and this hearing:

3. By a claim form presented on 2 June 2020 the Claimant brought the following complaints;
 - a. Unfair dismissal;
 - b. Breach of contract (relating to notice) for one months' notice pay amounting to £1,083 gross.
4. The dates of the ACAS early conciliation certificate are 30 April 2020 until 30 May 2020. An act occurring on or after the 1 February 2020 will be in time.
5. It is not in dispute that the Claimant was employed from the 10 November 2019 to the 17 April 2020 (just over 5 months service). The Respondent agrees the employment dates in its Response form.
6. By the dates of service, no time limit jurisdictional issues are raised with this claim however, as the Claimant did not have the requisite service to claim unfair dismissal, that complaint was dismissed by judgment dated 14 July 2020.
7. There is no dispute between the parties in the Claim form or Response form as to the hours of work a week or the level of pay, which is 40 hours a week and £1,083 gross or £1,040 net a month.
8. The Claimant says he was employed as an Accounting Apprentice, but the Respondent in its Response form says the Claimant was employed as a Debt Management Support, Property Business Support and Administration Support. However, the Tribunal noted to the parties that the copy employment contract that the Respondent submitted with its Response states the Claimant's job title is Accounting Apprentice (as at clause 3). As it happens the Claimant's job title is not a matter this Tribunal needs to reach a decision on to determine the Claimant's complaint.
9. In advance of the hearing (by email dated 5 November 2020) the Claimant submitted a set of documents running to 35 pages. This also included a copy of his employment contract. The correspondence attached confirmed the Claimant relies on clause 18.2 of that contract:

"18.2 The Employee is entitled to receive one weeks' notice from the Employer in order to terminate his/her contract within the first 3 months and thereafter one months' notice."

10. By email dated 7 December 2020 the Respondent's sole director Colin Davison informed the Tribunal that due to a COVID outbreak at his child's nursery he would not be able to participate at the hearing. No application for a postponement was made, so by email of the same date the Respondent was asked by the Tribunal "... to confirm by return if he consents to the hearing proceeding in his absence. If the respondent does so consent then if he has any documents or written submissions he wishes to submit he must send copies of these to the Tribunal and the claimant by return also.". The correspondence also made it clear to the Respondent that ... "as it is seeking to argue that the claimant committed a serious breach of contract so as to forfeit his contractual notice the burden of proof is on it. By the respondent not attending and giving evidence, it is difficult to see how it can discharge the burden."
11. By email of 8 December 2020 the Respondent submitted a ... "Case Summary for the Respondent Cranleys Staffing Limited as well as the supporting Witness Statement and additional Evidence as provided in the Appendix to the Witness Statement."
12. The hearing commenced at 10am and both the Claimant and the Respondent were in attendance and ready to proceed.
13. The documents submitted by the parties were considered with the parties and the issues were confirmed with the parties as follows:
 - a. The Claimant seeks £1,083 gross in notice pay pursuant to clause 18.2 of his employment contract. This monetary amount was not in dispute.
 - b. The Respondent submits the Claimant was dismissed pursuant to clause 17.1 so no notice or payment in lieu of notice is due to him.
 - c. It was highlighted that the witness statement from Mr Davison does not refer to clause 17.1 of the employment contract but it is noted within the Response form in reply to question 5.3. Mr Davison confirmed that he relies on that clause of the contract which reads:

"The Employer may end the Employment without notice or pay in lieu of notice in the following circumstances:

17.1 If the Employee has committed a serious or repeated breach of any of his obligations under this agreement or the Employer has reasonable grounds for believing s/he has done so"
 - d. Mr Davison confirmed that he does not rely on clause 17.3 of the employment contract, which is also referred to in the Response form

and which also quotes clause 16.2.4 from the contract, which itself appears to be a typo within the contract as numerically it would actually be 17.2.4.

14. The hearing had been listed to start at 10am and last for one hour (as per the Notice of Hearing dated 16 October 2020). However, the hearing in the end lasted until just after 13:00 (so 3 hours) with delivery of oral judgment. After the issues were agreed evidence and submissions were heard for approximately 2 hours (until 12:15pm) with rest breaks as agreed with the parties. There was then an adjournment for deliberation of approximately 35 minutes.
15. I heard evidence from Mr Colin Davison (he affirmed his 18-paragraph statement and the Response form referring to clause 17.1 of the employment contract) on behalf of the Respondent. I also heard evidence from the Claimant although he had not produced a written statement so his evidence was given and affirmed orally.

Findings of fact

16. There was a degree of conflict on the evidence. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties at this hearing.
17. In evidence Mr Davison confirmed that he relied upon:
 - a. The “repeated breach of any of his obligations under this agreement” part of clause 17.1 of the employment contract.
 - b. He confirmed that the repeated breaches were in respect of timekeeping at lunch breaks and not performing the work he says was agreed with the Claimant to be done at a meeting on the 18 February 2020 (as set out at paragraphs 6 to 13 of his statement).
 - c. He relies upon a summary document he had created for this hearing titled “Appendix (Performance and Work Plan Whiteboard)” and a copy of the whiteboard in support. He accepted that there was no other documentary evidence to support matters because he asserts the Claimant accepted that his performance was not good enough when they met on the 17 April 2020. He therefore relies on paragraph 14 of his statement ... “Over the period of the review of 4 weeks, Alex achieved very little of any of these tasks”.
18. Mr Davison accepted there is no documentary evidence to support him highlighting the need for improvements by the Claimant since the meeting

on the 18 February 2020, instead he refers to discussions he says were had with the Claimant over a handful of video calls.

19. Mr Davison accepted there is no detail in the summary document as to how late the Claimant was returning from lunch on the days he records. In oral evidence Mr Davison confirmed it was on most days only 10 minutes, and he didn't get focused on the timings themselves.
20. It is noted that lunch breaks are referred to in the contract of employment at clause 6.1 which refers to lunch being between 1pm and 2pm. The Respondent does not rely on this clause in its evidence.
21. As to the termination of employment Mr Davison describes this at paragraph 17 of his statement ... "When we sat down to discuss the summary I had created at the review meeting, Alex failed to provide any meaningful response to why he had not done anything over the 4 week period of any value. He eventually said, he wanted to stay working but for me to not pay him for the last month's salary as he had not done anything".
22. It was the Claimant's evidence that he was only late from lunch on one occasion and that was approved.
23. He did not accept that his performance was poor. He said the details on the whiteboard were what he drew up at the start of lock down (due to the COVID pandemic) to help Mr Davison manage communication of tasks with him.
24. As to the meeting on the 17 April 2020 the Claimant recalls Mr Davison telling him his employment was not financially viable and he was offered a marketing role but as it was not an employment position he did not want it. The Claimant said that he was mainly listening to what Mr Davison said and he may have responded "I am sorry I don't see where you are coming from", but he doesn't recall saying don't pay me for the rest of month, or words to that affect.
25. Clearly there is a difference of evidence on these matters so I have considered carefully the emails between the parties that were presented in evidence and are contemporaneous to the period of disputed facts:
26. At page 34 of the Claimant's submitted papers is an email from Colin Davison to the Claimant dated 17 April 2020 and timed at 18:13.... which says:

"Dear Alex

Today we reviewed your progress on the company and I informed you this was not acceptable. To avoid being formally dismissed on the basis of the

poor performance, you offered to not be paid the last three weeks. I made the priorities of work and saw no evidence of these being completed, I then asked for focus hours around different work areas and again saw no real effort made. Over three requests over the weeks were made in a record of your time and nothing was provided, then checking activities over months, both Adam and myself found activity levels were less than 10 emails on a typical day.

I confirmed that this performance was not a reflection of the last few weeks, but the work completed over the duration of your apprenticeship period and I am happy to highlight the components of these if you would like another meeting. I responded, that would not be appropriate but we could end matters today with your agreement. I mentioned if there was an interest in another work in marketing, that is all I need to work on right now, but you were not interested in that.

After ending our meeting, on friendly terms, I was happy to offer a reference to cover your period for a further 12 months on employments that you should find over the year ahead. Our meeting ended 13:28 and you then went off. To make you feel valued, I asked for you to tidy things up in the afternoon. We went out and returned for 14:05 from the lunch trip.

At 15:00 you returned, after taking keys you left at 15:21. We were not impressed at timekeeping, and did not want you to feel you could contribute further.

At 16:46, you have then called me to request, in the same way you asked 3 weeks ago to be furloughed and for my business to take the risk of reclaiming part of the cost back. We do not accept any form of improper use of public money, and certainly there has never been a public meeting component to our work or your work that is significant or prevents your or my work from progressing well in these periods of lockdown. I am purely at home as have been the person responsible for my youngest son and the office is not the best environment for him. It has not affected your ability to work, at all times I was asking about progress and work continued.

Please be clear, by way of any doubt, your acceptance of the employment ending, we agreed an immediate ending and was a result of the highlighting the poor performance over the period. I would rather end this amicably and without feeling or any regrets and for Cranleys to be able to assist you in the future career progression.

Sorry, I do not take the threats that there is any form of malice implied by your father. I do wish you well.

To summarise, this is not connected with Coronavirus, you recognised that progress in the work had not been made including an offer to have the last three weeks unpaid. I confirmed that would not be the case and I will not accept inappropriate further improper proposals.”

27. From this email I have noted in particular:

“... To avoid being formally dismissed on the basis of the poor performance, you offered to not be paid the last three weeks...”

“... I confirmed that this performance was not a reflection of the last few weeks, but the work completed over the duration of your apprenticeship period and I am happy to highlight the components of these if you would like another meeting. I responded, that would not be appropriate but we could end matters today with your agreement. I mentioned if there was an interest in another work in marketing, that is all I need to work on right now, but you were not interested in that.”

“... After ending our meeting, on friendly terms, I was happy to offer a reference to cover your period for a further 12 months on employments that you should find over the year ahead...”

“Please be clear, by way of any doubt, your acceptance of the employment ending, we agreed an immediate ending and was a result of the highlighting the poor performance over the period.”

28. Then by email dated 29 April 2020 (at page 33) this is where the Respondent makes reference to clause 17.1 of the employment contract:

“Dear Alex

Your employment ended due to the series of breaches of your duties. On discussion you referred to the last 3 weeks being unpaid when I went through the various uncompleted tasks and the fact in 8 hours you had sent out 5-8 emails within an hour of each day. When asked about the other tasks set, you failed to respond to the fact they were not showing as attempted.

I said I could not do that but would be ending it as you provided no explanation for these tasks not being delivered. I believed you in effect offered resignation to avoid this on your employment record but should this not be the case there was never a termination for any other reason discussed at the meeting.

17.1 If the Employee has committed a serious or repeated breach of any of his obligations under this agreement or the Employer has reasonable grounds for believing s/he has done so

You will also refer to the many tasks we discussed and you could not provide any reason for these not being delivered. We went through the many grounds for a total neglect for tasks being requested and there were many examples.”

29. From this email I have noted in particular:

“... I believed you in effect offered resignation to avoid this on your employment record but should this not be the case there was never a termination for any other reason discussed at the meeting.

17.1 If the Employee has committed a serious or repeated breach of any of his obligations under this agreement or the Employer has reasonable grounds for believing s/he has done so...”

30. I have then reminded myself as to what Mr Davison’s witness statement says and contrary to what is recorded in the emails as set out above it does not refer to the Claimant resigning or agreeing to go. As at paragraph 17 of his witness statement ... “... He eventually said, he wanted to stay working but for me to not pay him for the last month’s salary as he had not done anything.”.

31. During his cross examination by the Claimant, Mr Davison was asked about his reference to the Claimant saying, “wanted to stay working” and Mr Davison accepted that it was not what the Claimant said, but he had inferred it from the content of the conversation.

32. The contemporaneous emails do appear to support the Claimant’s position more than that of the Respondent’s. The email on the 17 April 2020 records a lack of clarity as to the performance issues “... I confirmed that this performance was not a reflection of the last few weeks, but the work completed over the duration of your apprenticeship period and I am happy to highlight the components of these if you would like another meeting. I responded, that would not be appropriate but we could end matters today with your agreement.” No such other meeting happened to “highlight the components”. Further, an offer of a marketing role was made “... I mentioned if there was an interest in another work in marketing, that is all I need to work on right now, but you were not interested in that”.

33. The email on the 29 April 2020 records ... “... I believed you in effect offered resignation to avoid this on your employment record.”. This does not support a dismissal of the Claimant on the 17 April 2020 pursuant to clause 17.1 of the employment contract.

The law

34. Having established the above facts, I now apply the law.
35. The Claimant's claim for breach of contract is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the claim was outstanding on the termination of employment.
36. As the Respondent is seeking to rely on clause 17.1 of the employment contract to dismiss the Claimant without notice or pay in lieu of notice, it is for it to prove on the balance of probability that it can do so.

The decision

37. Addressing the Claimant's complaint for breach of contract (notice pay).
38. What was the Claimant's notice period? This is one month based on clause 18.2 of the employment contract and his length of service.
39. Was the Claimant paid for that notice period? No, the Claimant was not. The undisputed monetary amount claimed is £1,083 gross.
40. If not, did the Claimant commit, as relied upon by the Respondent, a "... repeated breach of any of his obligations under this agreement ..." pursuant to clause 17.1, so that the Respondent was entitled to dismiss without notice? I do not find that the Respondent has proven this on the balance of probability.
41. There is no contemporaneous documentary evidence before me on what obligations under the agreement have been repeatedly breached by the Claimant. The Respondent's evidence on the timekeeping issues for example did not assert a breach of the Claimant's obligations under the agreement, Mr Davison confirmed it was on most days only 10 minutes, and he didn't get focused on the timings themselves. The Claimant did not accept he was late in this way. As to performance the Claimant did not accept his performance was poor. Without further evidence there is no reason to not accept, on the balance of probability, the evidence of the Claimant on these matters.
42. The Respondent's email of the 17 April 2020 does not record or have the tone of dismissing someone pursuant to clause 17.1 of the employment contract. Quite the opposite in my view as it is friendly in tone with the offer of marketing work and the offer of a reference.
43. The Respondent has not therefore discharged the burden of proof to show it can dismiss the Claimant without notice or pay in lieu of notice, and that it

did do so pursuant to any clauses of the employment contract. This means the Claimant is entitled to his one month of notice pursuant to the terms of the contract.

44. The judgment of the tribunal is that the Claimant succeeds in his claim for breach of contract (notice pay) and the Respondent is ordered to pay the Claimant the gross sum of £1,083.

Employment Judge Gray

Date 27 January 2021

Reasons sent to the parties: 29 January 2021

FOR THE TRIBUNAL OFFICE