EMPLOYMENT TRIBUNALS

Claimant: **Mr S Babaei**

Respondent: **Final Post Limited**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **11 December 2020**

Before: **Employment Judge Gardiner**
Members: **Ms M Long**
Mr B Wakefield

Representation

Claimant: Mr Howard Lewis-Nunn, counsel

Respondent: Ms Theodora Hand, counsel

JUDGMENT having been sent to the parties on 16 December 2020, the Respondent has requested written reasons in an email dated 21 December 2020.

REASONS

1. This is a claim for unfair dismissal and for unpaid notice pay. There is also a claim for unpaid overtime payments. Mr Babaei, the Claimant, worked for the Respondent film production company as a Production Manager until his dismissal with effect from 6 November 2019. There is a dispute as to the true reason for the Claimant's dismissal. The Respondent contends that it dismissed the Claimant on the expiry of a six-month fixed term or alternatively for misconduct. The Claimant considers he was not dismissed for either reason. Instead, he believes he was dismissed in order to save money.

2. The Tribunal has heard evidence from Mr Bhattacharjee, who is Company Director of the Respondent, and from the Claimant himself. Both witnesses were cross-examined. In addition, the Claimant relies upon character evidence from Dominika Besinska, who has not been called to give evidence. Because she has not been called to give evidence, this inevitably affects the weight to which we can attach to

her evidence. In any event, the relevance of her evidence is limited to the issues which were identified at the outset of the hearing.

3. We have also had regard to the evidence in an agreed bundle of 130 pages, to the extent to which we have been specifically directed to particular pages in the course of evidence.

4. Towards the end of his employment, the Claimant was earning just under £2000 per month in salary. Despite this, he had not been provided with any written particulars recording the key terms of his employment as is required by Section 1 Employment Rights Act 1996. Whilst there are many factual disputes between the two individuals who have given evidence, there are relatively few documents which assist us in resolving those factual disputes. We have had to form a view on the credibility of the evidence of Mr Bhattacharjee on the one hand, and the credibility of the Claimant on the other.

5. So far as the credibility of Mr Bhattacharjee is concerned, we have concerns about the credibility of parts of his evidence. He was vague as to dates of key events, there were significant and important differences between his version in his witness statement and the version in the Grounds of Resistance. At times in his evidence he appeared reluctant to give a straight answer to a straight question.

6. By contrast, we found the Claimant to be a plausible witness who was, on occasions, willing to make concessions which were against his own interest - such as being willing to accept he had agreed that his overtime pay could be taken as holiday and that it would subsequently be paid as time off in lieu.

7. The first issue that we need to resolve is the reason for the Claimant's dismissal. It is agreed that the Claimant was dismissed with effect from 6 November 2019. On that date he was sent the following email from an email address named 'Human Resources'. It was copied to Mr Bhattacharjee and also to his wife, who apparently had responsibility for payroll and related matters.

> Dear Saeed
>
> First of all we would like to thank you for all the hard work.
>
> Please take this as your notice that we no longer require your services on a full time basis. The reason for your termination is for you being a director/person of significant control of a similar business to that of your employer without notifying us which is a conflict of interest and a question on your integrity.
>
> As there is no contract between us therefore we cannot stop you from continuing with your company, nevertheless we cannot keep you as one of our employees either. We can carry on working as freelance basis as we have developed a good relationship.
>
> As per the extra working hours for MIB, we have agreed to pay 4.25 days which you can claim as holiday pay in lieu. Whatever holiday is outstanding shall be covered with your last pay this month payable beginning of next month when your P45 will be issued as well.

You do not need to come to work anymore as your termination is with immediate effect so please take your belongings and handover all necessary paperwork you have done so far, ID, password to Ruhi/Mahbub.

Please do not hesitate to contact us if you require any professional references.

8. Mr Babaei's case is that this email was the first he knew he was being dismissed. He was not expecting his employment to end when it did. In fact, he says that he had submitted leave requests in relation to leave over the Christmas period and was waiting to hear back as to whether these requests had been approved.

9. Mr Bhattacharjee maintains that the reason the Claimant was dismissed when he was is this - that this was the end of a six month period of notice that had been agreed at a meeting back in May 2019. Despite the existence of an email from 'Human Resources', which might indicate that there was a dedicated HR function within the Respondent, this alleged agreement was never recorded in writing. Nor is it evidenced by any contemporaneous document. The only document relied up to suggest that the Claimant had agreed to end his employment at an earlier stage is the following email sent by Mr Bhattacharjee on 1 October 2019:

Hi Saeed,
The Sat-Sun payments as standard will be done with your last payments with us. I have spoken to Mahbub and producer and the overtime payments cannot be adjusted as it will be unfa

10. This is a curious email, not least that it appears that the content of the email is incomplete - as Mr Bhattacharjee himself acknowledged. He may have decided that the Claimant's employment was coming to an end, but the email does not clearly evidence an earlier agreement to that effect, nor the basis on which such an agreement would have been reached. We do not read the reference to "your last payments with us" as necessarily a reference to his last payslip at the point at which his employment terminated, because of the timing. If the employment was to end at some point in November 2019, it would be expected that there would be two further payslips – one for October and one for November. No good reason has been provided as to why this payment would have to wait until the final payslip, rather than the next payslip at the end of October.

11. The other curiosity, in relation to the Respondent's case, is that on the Respondent's evidence it only discovered the existence of the Claimant's company after May 2019. The reason, on the Respondent's case, why the Claimant had been put on a six-month fixed term contract in May 2019 was the purported concerns about his performance and behaviour over the past year. Yet these concerns are not referred to in the dismissal email, nor does the email state that employment will end as previously agreed when the six months comes to an end. In fact, the last date of employment appears to pre-date the end of the six-month period, even on the Respondent's own case. That is because the meeting at which the Respondent alleges that six months' notice was given was in mid May. Mr Bhattacharjee in his witness statement puts it as occurring after 14 May 2019 (paragraphs 14 and 15). If he had been acting consistently with six months' notice given at such a meeting, then the employment would have continued until at least 14 November 2019.

12. Therefore, we reject the Respondent's primary contention that the reason for dismissal was expiry of a fixed term notice period. The Respondent's secondary contention is that the reason was misconduct. In particular, two aspects are relied upon. The first alleged act of misconduct is the discovery that the Claimant was a director of a company which also was involved in film production. The second is the suspicion that the Claimant had been working for that company during working hours when he was being paid by the Respondent.

13. So far as the first is concerned, it is at least supported by the email on 6 November 2019. However, there is a dispute as to when the Respondent first discovered that the Claimant had his own company. The Respondent accepts that the Claimant was doing his own freelance work at weekends, which he was entitled to perform. On the Respondent's own case, it discovered that the Claimant had significant involvement in a film production company in July 2019 and yet continued his employment for over three months thereafter without issuing him with any disciplinary sanction at the time or even any written request that he choose to work for one company rather than both. It is the Tribunal's experience that within the media world generally, it is quite common for those who are in employment to also be involved in freelance work. It appears to us that the important issue is not whether the Claimant was the director of a company but whether the Respondent believed that the work that the Claimant was performing through that company was in conflict with the Claimant's responsibilities to the Respondent.

14. The Respondent's evidence has been vague on this point. Mr Bahattacharjee has not clearly pointed to any specific act by the Claimant that amounts to a competitive act in taking business that might otherwise be won by the Respondent. We reject the evidence that the Respondent genuinely considered that the Claimant's conduct in starting this company amounted to gross misconduct.

15. The second alleged misconduct in relation to this other work was carrying out this work during time when he was being paid by the Respondent. There was no clear evidence available to Mr Bhattacharjee that the Claimant had been engaged in his own work during working hours other than the fact that he was seen to have been speaking in Farsi. However, the contents of the conversation were not understood by the person who had heard it. At its highest, the Respondent's evidence was that a conversation in Farsi during the working day led to a genuine suspicion the Claimant was engaged in other work when being paid by the Respondent. However, this suspicion was not referred to in the termination email. We think it inherently unlikely that such a conversation alone, without any further insight into the nature of the conversation, would be the basis for a genuine suspicion that the Claimant was engaged in competitive activity. We reject the Respondent's contention it was the reason, or the principal reason, for the Claimant's dismissal.

16. Therefore we reject the alternative reason advanced by the Respondent for dismissal. We feel that the likelihood is that the principal reason the Claimant was dismissed, as the Claimant alleges, was in order to save money. That is why the Respondent was still willing to engage him on a freelance basis, which would be

potentially cheaper in that it would not have to guarantee the Claimant a minimum amount of pay, as it would if he had continued as an employee.

17. Having so found, the issue of *Polkey* does not arise for consideration. This was a cost saving decision, not a case of a potentially justified dismissal for conduct where there has been a failure to follow a fair procedure.

18. For the same reason, the issue of contributory conduct does not arise. We do not consider that the Claimant's conduct was a causal factor in his dismissal, which was taken for cost cutting reasons.

19. The Claimant is entitled to two weeks' notice pay. There is as yet no agreement as to his level of earnings at the point of dismissal so this will have to be determined at a remedy hearing unless it can be dealt with by way of agreement.

20. As to the overtime claim, we do not consider that the Claimant has proved he is entitled to be paid for a further 31 hours work. The likelihood is that he was paid for these hours in his final payslip when he was paid £376.79 as TOIL.

21. We consider that there has been a complete and total failure to comply with the ACAS Code of Conduct on Disciplinary Procedures. The Claimant is therefore entitled to an uplift in terms of the compensation he is to be awarded. It would not be appropriate to put a percentage figure on the uplift at this point because the caselaw stipulates that we are to have regard to the total size of the award when assessing the amount of the uplift. However, our starting point is likely to be at the top or close to the top of the available band given the extent to which there has been a failure to comply.

22. We do not consider that there is a viable claim under Section 10 Employment Relations Act 1999 for refusal of the right to be accompanied. The Claimant never requested that he be accompanied at any hearing and therefore there has been no refusal by the Respondent. There is therefore no compensation due under this head of loss.

23. So far as the claim for failure to provide a statement of employment particulars is concerned, this failure has been conceded. The issue we have to decide is what remedy to award for this failure. We consider that the appropriate award is one of four weeks' pay. We do so because there was a total failure to provide any written particulars of employment. This ought to have been done within three months of the start of employment and this failure continued despite changes in the Claimant's pay and despite the passage of over two years since the date on which his employment started. As a result, the maximum award is appropriate.

24. We fix a remedy hearing for 28 April 2021 with a time estimate of 1 day. We make case management directions which are detailed in a separate case management order.

Employment Judge Gardiner
Date: 4 February 2021