



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Fernandes

**Respondent:** Capita Business Services Limited

**Heard at:** London Central (via CVP)      **On:** 9<sup>th</sup> March 2021

**Before:** Employment Judge Nicklin

## **Representation**

Claimant: in person

Respondent: Mr Tytherleigh (Solicitor)

**Note:** This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video, conducted using Cloud Video Platform (CVP). It was not practicable to hold a face-to-face hearing because of the COVID-19 pandemic.

# JUDGMENT ON A PRELIMINARY HEARING

1. The claim for a redundancy payment and the claim of unfair dismissal are dismissed on withdrawal by the Claimant.
2. The following parts of the claim for breach of contract are struck out as having no reasonable prospect of success:
  - a. The claim for compensation for loss of a mortgage offer during the Claimant's notice period;
  - b. The claim for compensation for the perception of being unemployed in other job applications during the notice period.
3. The tribunal does not have jurisdiction to entertain a claim for personal injury arising from an alleged breach of contract (i.e. stress and anxiety). The claim is dismissed.
4. The tribunal will determine the remaining claim for breach of contract at a hearing on **Friday 28<sup>th</sup> May 2021** at **10am**, with a time estimate of 1 day.

# REASONS

1. By a claim form presented on 1 November 2020, the Claimant brought the following claims:
  - 1.1. Unfair dismissal, alleging an unfair redundancy process;
  - 1.2. Redundancy payment; and
  - 1.3. Breach of contract.
2. The Claimant was employed by the Respondent as a Managing Principal in its Consulting and Growth Division from 6<sup>th</sup> January 2020 until his dismissal for redundancy on 21<sup>st</sup> August 2020. He was given notice on 23<sup>rd</sup> July 2020 and initially worked 4 weeks of his 3-month notice period. The Respondent then paid the remaining 9 weeks of his notice in lieu, pursuant to a payment in lieu of notice (“PILON”) clause in his contract of employment.
3. On 16<sup>th</sup> November 2020, the tribunal wrote to the Claimant giving a strike out warning in respect of his unfair dismissal claim. This is because the Claimant did not appear to have two years’ continuous employment with the Respondent to be able to bring this claim.
4. On 12<sup>th</sup> February 2021, the Respondent’s solicitors applied to strike out the claims on the basis that they have no reasonable prospect of success.
5. The case was listed for a two-day hearing on 9 and 10 March 2021, but Employment Judge E Burns converted the listing into today’s preliminary hearing to determine the application.
6. I was provided with an 84-page joint bundle and read the email correspondence sent to the tribunal by both parties prior to the hearing.

## **Unfair dismissal and redundancy payment**

7. Having accepted that he does not have two years’ continuous employment to bring a claim for redundancy payment and the type of unfair dismissal claim he has presented, the Claimant confirmed he wished to withdraw those claims.

## **Breach of contract**

8. The Claimant accepts that he was paid his basic salary for all of his notice period. He confirmed that his breach of contract claim was based on the following:
  - 8.1. Whilst the Claimant accepts that there is a PILON clause in his employment contract (enabling the Respondent to pay only basic salary in lieu of any notice) he alleges that his contract has been varied by a later agreement said to have been made at a meeting on 16<sup>th</sup> July 2020, in which the parties agreed that he would be able to work out his notice. On this basis, he would be able to enjoy his other contractual benefits during this time.
  - 8.2. The Claimant therefore alleges that this agreement was breached by a later unilateral decision of the Respondent to terminate his employment after only 4 weeks of the notice period, with pay in lieu being made on basic salary only thereafter.

9. His losses claimed on this basis are as follows:
- 9.1. Loss of contractual holiday pay for the 9-week period when he could not work his notice;
  - 9.2. Loss of contractual car allowance for the 9-week period when he could not work his notice;
  - 9.3. Loss of employer pension contributions for the 9-week period when he was unable to earn reckonable pay in the notice period;
  - 9.4. Loss of a chance to obtain alternative employment with the Respondent during the remaining 9-week notice period. The Claimant says he was in conversations with the Respondent about another role which ended because his employment terminated after only 4 weeks of the notice period;
  - 9.5. Loss of a mortgage offer because he was not employed during the remaining 9-week notice period;
  - 9.6. Losses allegedly arising in other job applications by the perception of being unemployed earlier than was agreed; and
  - 9.7. Losses in respect of stress and anxiety allegedly caused by breach of contract.
10. The parties agree that a breach of contract claim has been brought in time because, taking into account the Claimant's dates provided on his ACAS Early Conciliation certificate, his claim was presented within 3 months of the date of termination of his employment.

### **Strike out**

11. Rule 37(1)(a) of the tribunal's Rules of Procedure provides:

*At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*

*(a) that it is scandalous or vexatious or has no reasonable prospect of success;*

12. There is a two-stage test to be applied (Hasan v Tesco Stores, UKEAT/0098/16, 22 June 2016, unreported). First, I must consider whether the claim or part of the claim has no reasonable prospect of success. If that test is met, I must go on to exercise a discretion as to whether or not to strike out.
13. The tribunal should not conduct a mini-trial and, as such, it is only in an exceptional case that it will be appropriate to strike out where the issue to be decided is dependent on conflicting evidence (E D & F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472 per Potter LJ; Lockey v East North East Homes Leeds UKEAT/0511/10/DM, 14<sup>th</sup> June 2011).

### **The Respondent's application**

14. The Respondent invited me to strike out the entirety of the claim. Mr Tytherleigh submitted that there is a clear PILON clause in the Claimant's employment contract which provides that the Respondent can pay only basic salary in lieu of notice. This having been paid, there is no breach of contract. The Respondent does not accept that there has been any variation or collateral agreement in July 2020 entitling the Claimant to work out all of his notice. It

contends that the record of the meeting on 16<sup>th</sup> July (relied on by the Claimant as evidence of a variation) makes out a preference to work out his notice, but lacks the certainty required to form any variation of contract.

15. Even if there were a variation of contract, the Respondent says the Claimant is unable to demonstrate his losses and most of his claims are not claims which the tribunal can properly hear.

### **The Claimant's response**

16. The Claimant set out the basis of his claims (summarised above). He explained that there was an agreement formed at the meeting on 16<sup>th</sup> July and it was a breach of contract to stop him from working out all of his notice. He maintains that he would have enjoyed contractual holiday pay, his car allowance and further employer pension contributions but for the breach. He also said that he was in conversations with the Respondent to take on another role (meaning his redundancy would be avoided) during the working part of his notice period, but this was cut short by early termination. He says he lost the opportunity to pursue the alternative role.

17. As regards his other claims, he accepted that he would be in difficulty in quantifying damages in respect of the loss of a mortgage offer. This head of claim is based on his employment terminating in August rather than October and a mortgage offer therefore being withdrawn. As to a loss arising from a perception of being unemployed, his argument was that he was disadvantaged by having to apply for other jobs with the status of being unemployed rather than working under notice. He acknowledged it was difficult to say what loss flows from this. The Claimant found new employment on 7<sup>th</sup> December 2020. He referred to a possible percentage loss in salary but accepted that this type of loss flows from an unfair dismissal claim, which could not be pursued.

### **Discussion**

18. I reminded the parties that I have not heard evidence and I am not finding facts, determining the claim or giving an indication to the Claimant as to the overall prospects or merits of his case.

19. In my judgment, the Claimant has an arguable claim as to any alleged variation to his contract. It is a rare case where the tribunal should strike out a claim on the ground of no reasonable prospect of success where evidence needs to be heard from the parties to make findings of fact. The Claimant points to a written record of the meeting on 16<sup>th</sup> July where a box is ticked showing that he will work all of his notice period. It is signed by both parties. The tribunal will need to hear oral evidence from the Claimant and the Respondent about the discussion in the meeting, the events that followed and then make findings about the legal effect of the discussions and the signed document.

20. Accordingly, there is a reasonable prospect of success on the Claimant's liability argument that there was a variation to his contract and/or a collateral agreement and that this was breached by a unilateral decision to terminate his working notice early.

21. The Claimant must establish a loss flowing from any breach of contract. In my judgment, he has a reasonable prospect of success in proving that, if his liability argument succeeds, he may have suffered:

- 21.1. Lost contractual holiday pay for the 9 weeks not worked;
  - 21.2. Lost contractual car allowance for that period; and
  - 21.3. Lost employer pension contributions for that period.
22. The above items were not paid to him during this period because the PILON clause provides only for basic salary. If he was working his notice, he has a reasonable prospect in being able to establish that these items would have been paid because the restriction in the PILON clause would not apply. The Claimant has calculated the value of those losses and he can be cross examined by the Respondent about them at a final hearing.
23. I decided that there is a reasonable prospect of success in the Claimant's argument that he has suffered a loss of a chance or opportunity to secure an alternative role with the Respondent during his notice period. This is because:
- 23.1. There is a factual dispute requiring evidence from both parties. The Claimant says that he was in conversation with the Respondent about another role. That conversation could not continue because his employment terminated after 4 weeks of the notice period.
  - 23.2. Consideration of alternative employment is a feature of a redundancy process and it is acknowledged in the Respondent's letter giving notice of dismissal on 23<sup>rd</sup> July 2020 (page 65-66 of the bundle) that if the situation changes in respect of work opportunities, the Respondent reserves the right to rescind notice of redundancy. On that basis, the Claimant does have prospects of arguing that the opportunity for another role was cut short.
  - 23.3. If facts are found establishing there was an opportunity lost for an alternative role, the Claimant may arguably be able to say that there is a loss, which will be for him to prove, between that role and the role he subsequently obtained elsewhere, subject to mitigation and remoteness arguments.
  - 23.4. Whilst the Respondent contended that the tribunal could not hear such an argument, the specific legal basis for this submission was not set out. The Respondent will be able to argue any such point, if so advised, at a final hearing.
24. I decided to strike out the two heads of claim concerning a loss of a mortgage offer and an alleged loss arising from the perception of being unemployed in other job applications. This because:
- 24.1. The Claimant accepts his difficulty in being able to properly quantify any loss for these two claims and to show how any loss flows from a breach of contract allegedly committed by the Respondent. The Claimant must be able to establish a loss in order for a claim of this nature to crystallise.
  - 24.2. In my judgment, taking the Claimant's case at its highest, there is no reasonable prospect of the Claimant establishing that these losses, even if quantified and proved, are foreseeable losses in the contemplation of the parties. The Claimant is advancing a claim based on the consequential effects of the decision to shorten his working

notice. This does not mean that the Respondent is liable for all possible financial consequences which might result.

- 24.3. The Claimant does not therefore have any reasonable prospect of successfully arguing that the Respondent is liable in contract for his mortgage offer being withdrawn following a decision to make him redundant. In any event, there is no discernible loss which could flow where he found new employment a few months later on a high salary, well above the national average.
- 24.4. The argument about the 'perception' of being unemployed is misconceived and bound to fail. Whether the Claimant was working his notice of redundancy or had been paid in lieu of redundancy placed him, in either event, into the job market.
- 24.5. I have also considered whether to exercise my discretion having found these two claims have no reasonable prospect of success. In my judgment, there is no good reason for either claim to proceed or for them to be advanced in any other way by the Claimant. Accordingly, they are both struck out pursuant to rule 37(1)(a).

**The claim for damages for stress and anxiety**

25. The tribunal does not have jurisdiction to hear a contract claim for damages for personal injury (Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994). Claims for stress and anxiety are claims of psychiatric damage. Accordingly, this claim is dismissed.

**Outcome**

26. It follows that the remaining claim for breach of contract for losses allegedly arising in the notice period concerning contractual holiday pay, car allowance, pension contributions and loss of opportunity to secure an alternative role will be determined at a hearing before an Employment Judge sitting alone on **28<sup>th</sup> May 2021 at 10am** with a time estimate of 1 day.

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Employment Judge Nicklin

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Date: 15<sup>th</sup> March 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

16/03/2021

FOR THE TRIBUNAL OFFICE