EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111247/2019 (V)

Held via Cloud Video Platform (CVP) on 12 October 2020

Employment Judge S MacLean

Mr S Chisholm	**Claimant** **In Person**
City Gate Construction (Scotland) Ltd	**Respondent** **Represented by:** **Mr G Tracey -** **Finance Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

(1) The respondent unfairly dismissed the claimant and is ordered to pay the claimant a monetary award of £3,633.53; the Employment Protection (Recoupment of Jobseekers Allowance and Income Support) Regulations 1996 do not apply; and

(2) The breach of contract claim is dismissed.

REASONS

Introduction

1. On 26 September 2019, the claimant sent a claim form to the Tribunal's office in which he claimed unfair dismissal when his employment was terminated by the respondent on 29 July 2019. The claimant seeks compensation. He also seeks damages for breach of contract for failing to pay notice pay.

2. The respondent sent a response denying that the claimant was dismissed. The respondent maintains that the claimant resigned and that he has been paid all sums that are due to him under his contract.

3. On 12 October 2020, following an application from the respondent, there being no objection from the claimant, the final hearing was converted to take place remotely because of the Presidential Guidance, the continued restrictions in relation to COVID-19 and it was just and equitable to do so.

4. The final hearing was conducted by means of the Cloud Video Platform. The claimant gave evidence on his own account. Mr Tracey, Finance Director, represented the respondent. Ronnie McDowall, Director, gave evidence on the respondent's behalf.

5. At the start of the final hearing, it was ascertained that everyone had access to the same file of documents.

Relevant law

6. Section 86(2) of the Employment Rights Act 1996 (the ERA) provides that an employee who has been continuously employed for one month or more is obliged to give at least one week's notice of termination. This is a minimum period of notice. If the employment contract provides for more notice, it is the longer notice that prevails.

7. Whatever the period of notice required, a resignation that specifies a termination date beyond the expiry of that period will still be valid. Once notice has been given (whether orally or in writing), it cannot be unilaterally withdrawn, and the contract will come to an end when it expires (see *Brennan v C Lindley & Co Limited* 1974 IRLR 153).

8. Section 95 of the ERA states that an employee will be treated as dismissed if his contract of employment is terminated by the employer with or without notice (section 95 (1)(a)).

9. If an employer cuts short an employee's notice period, this will convert the resignation into a dismissal unless the contract specifically allows for the employer to do this (see *Marshall (Cambridge) Limited v Hamblin* 1994 ICR

362), the EAT held that there was no dismissal when following the employee's resignation, the employer exercised a contractual right to waive the notice period and terminate the contract with a payment in lieu of notice.

10. Section 98 of the ERA sets out how a Tribunal should approach the question of whether a dismissal is fair. Section 98(1) and (2) provides that the employer must show the reason for the dismissal and it is one of the potentially fair reasons. If the employer is successful, the Tribunal must then determine whether the dismissal was fair or unfair under Section 98(4).

The issues

11. The issues to be determined by the Tribunal are:

    (i) Did the contract of employment terminate on 29 July 2019 by reason of resignation or was the claimant dismissed?

    (ii) Was the dismissal fair?

    (iii) What remedy should be awarded?

    (iv) Is the claimant entitled to damages for breach of contract (failure to provide notice)?

Findings in fact

12. The Tribunal makes the following findings in fact.

13. The respondent is a limited company carrying on business in the construction industry. It employs around 200 employees.

14. Leo Reilly is the respondent's Managing Director. Ronnie McDowall is a Director with responsibility for construction, Paul Barnes is a Senior Contracts Manager.

15. On 20 June 2016 the respondent employed the claimant as a joiner foreman. The claimant was issued written contract of employment.

16. Around 2 July 2018, the claimant was appointed as a Site Manager. He was paid monthly and issued with new contract of employment (the Contract).

17. Clause 41 of the Contract provides:

(i) The employer will provide the employee with one (1) month notice. The employee and the employer agree that this is reasonable and sufficient notice of termination of employment.

(ii) If the employee wishes to terminate this employment with the employer, the employee will provide the employer with notice of one (1) month. As an alternative, if the employee cooperates with the training and development of a replacement, then sufficient notice is given if it is sufficient notice to allow the employer to find and train the replacement.

18. There is no provision in the Contract for the respondent to make a payment in lieu of notice.

19. In January 2019 the claimant was asked by Mr Barnes to move from the role of Site Manager to Rot Supervisor. The claimant agreed to this. The Contract remained unchanged.

20. Around February 2019, the claimant and his partner discussed a once in a lifetime trip travelling around Europe for a year from late August 2019. The claimant knew that under the Contract, he required to give the respondent one month's notice of termination of employment. He did not want to do this prematurely as the proposed trip was not definite or finalised.

21. Around June 2019, the claimant became aware that the respondent was planning on sending him on an asbestos and manual handling course around 10 July 2019 and that steps were being taken to issue staff with new uniforms. At this stage the trip to Europe was being finalised and the departure date was 26 August 2019. The claimant felt that in the circumstance is was not morally correct for the respondent to spend money on training and uniforms when he knew that he would not remain in employment. The claimant also hoped that by doing the right thing, he would leave his employment with the respondent on good terms and that there might be opportunities for him when he returned from the trip.

22. On 1 July 2019, the claimant spoke to Ronnie McDowall and Paul Barnes and advised them of his decision to go travelling for a year and that he would be finishing up on 23 August 2019. Mr McDowall said that the claimant needed to

put this in writing. Mr McDowall indicated that when the claimant returned to Scotland, he should telephone Mr McDowall to see if there was any work available.

23. Following the discussion, the claimant sent an email to Mr McDowall on 1 July 2019 at 8:57 as follows:

"*Ronnie,*

As per our conversation I would like to hand my notice in to finish up on 23 August as I am going travelling for a year (or until my own money runs out!!), again I would like to thank you guys for the past three years and say that I have enjoyed my time working with CGC and hopefully can come back sometime in the future."

24. Later that morning, the claimant was shocked to receive an email from Mr McDowall (copied to Mr Reilly and Mr Barnes) sent at 10:25 as follows:

"Shaun, as per your contract, CGC accepts your resignation, however as per clause below

(i) If the employee wishes to terminate this employment with the employer, the employee will provide the employer with notice of one (1) month. As an alternative, if the employee cooperates with the training and development of a replacement, then sufficient notice is given if it is sufficient notice to allow the employer to find and train the replacement.

CGC only require one month's notice, this would result in your employment ceasing on 31 July thus giving CGC ample time to find a replacement, please confirm you understand and agree to those terms."

25. The claimant responded by email (copied to Mr Reilly and Mr Barnes) sent at 11:23 as follows:

"As I have said today, I was hoping to stay until 23 August. I only put in my resignation today as I didn't want CGC paying for the asbestos and manual handling course that they wouldn't benefit putting me through. If CGC want me to finish at the end of July, it will be on 29 July as I am on holiday 30 and 31.

Please advise on finishing date."

26. Mr McDowall replied (coped to Mr Reilly and Mr Barnes) at 11:29 saying that 29 July was fine.

27. On 3 July 2019 the claimant spoke to Mr Reilly about his resignation with effect from 23 August 2019 and Mr Reilly's desire for the claimant to leave on 29 July 2019. The claimant reiterating that he was not going to work for anyone else and the trip was a once in a lifetime opportunity. The claimant said that he would happily work until 23 August 2019 or leave at a date of Mr Reilly's choice but be paid up to 23 August 2019. Mr Reilly said that he was not moving the date of 29 July 2019. That date was set and nothing that the claimant could say would change his mind. It was his decision.

28. On 4 July 2019, the claimant sent an email to Mr Reilly confirming that he would happily work up until the expiry of his notice on 23 August 2019 or alternatively leave on a date of the respondent's choice but receiving a payment up to 23 August 2019.

29. The claimant continued to work but received no response from Mr Reilly. The claimant sent reminders on 11 and 18 July 2019. The claimant was aware that holidays he had previously booked for 30 July until 2 August 2019 had not been approved.

30. The claimant had raised a grievance on 18 July 2019 on the basis that he felt he was being unfairly treated and being bullied to leave by the respondent on a date earlier than the date stated on his resignation email. The grievance was acknowledged by the office manager.

31. On 29 July 2019 at 08:32 Mr McDowall sent an email to the claimant reiterating the respondent's position: both parties only required to give one month's notice. When the claimant gave notice on 1 July 2019, that he was resigning, that resignation was accepted and that the respondent only required one month's notice. The claimant replied at 08:50 stating that he had acted in good faith. He was extremely disappointment at the respondent's treatment. He was taking this as the respondent "sacking him". The claimant thanked Mr McDowall for the

time that he had worked him and was extremely disappointed that it had ended on his note.

32. The claimant's employment terminated on 29 July 2019. At the date of termination, the claimant was 35 years of age. The respondent had employed the claimant for three years. His gross weekly wage was £711.46 which equated to £556.36 net. The claimant was paid outstanding salary and holiday pay up to 29 July 2019. He left for his trip abroad around 26 August 2019.

33. The respondent found an employee from another division of the respondent company, who was available to take over the job that has been undertaken by the claimant from 29 July 2019.

Observations on witnesses and conflict of evidence

34. In relation to the findings in fact there was little dispute on the material findings that the Tribunal require to make to determine the issues.

35. The claimant gave his evidence in an honest, straightforward manner. He had considerable respect for Mr McDowall and Mr Barnes for whom he had worked for a number of years. It seemed to the Tribunal that but for the trip to Europe the claimant would have happily continued to work for the respondent. Indeed, his motivation in giving more notice that he was contractually required to do was to preserve the relationship in the hope that he might be able to find employment with the respondent on his return.

36. Mr McDowall also gave his evidence honestly and candidly. The Tribunal had no doubt that Mr McDowall had a high regard for the claimant. There was no suggestion that there was any issue with the claimant's performance. He had been promoted during his employment with the respondent; he was flexible in relation to his job role; and Mr McDowall was willing to consider reengaging the claimant when he returned from his trip. The decision for the claimant to stop working on 29 July 2019 was business not personal. A replacement had been found to ensure continuity of the client contracts. It was not necessary to have two people doing the job; costs needed to be kept to a minimum.

Deliberations

37. The Tribunal's starting point was to consider if the claimant had resigned or had been dismissed when his employment terminated on 29 July 2019.

38. It was agreed that on 1 July 2019 the claimant gave the respondent written notice of his resignation specifying a termination date of 23 August 2019. That date was beyond both the statutory and the contractual notice that he was required to give. However, that period of notice is still valid.

39. The Tribunal then considered whether the respondent, having decided that it did not want the claimant to work up to the end of his notice period on 23 August 2019, had converted the resignation into a dismissal.

40. Somewhat unusually in this case, there was no suggestion that the claimant's commitment or motivation following his resignation was likely to be low. Indeed, to the contrary, the claimant was keen to leave the respondent's employment under good terms. The motivation to cut short the notice period came from the respondent finding another employee to replace the claimant and the respondent did not want to pay two wages.

41. Once notice has been given, it cannot unilaterally be withdrawn. For that to happen, both parties needed to consent to the withdrawal or alternatively agree to a new date of termination. The claimant did not withdraw his resignation. There was no doubt that the claimant did not agree to the respondent's revised date of termination. The respondent did not have a contractual right to waive the notice period and terminate the contract with a payment in lieu of notice. Accordingly, by cutting short the notice period, the respondent converted the resignation into a dismissal.

42. The respondent did not argue that the dismissal was fair; it said that it did not dismiss the claimant. Mr McDowall's evidence was that the claimant's employment terminated on 29 July 2019 for was commercial reasons: continuity of service to clients and cost savings. The real reason for the dismissal was that the respondent did not want to pay more wages than it had to. The respondent did not show that the reason was a potentially fair reason under section 98 of

the ERA. The Tribunal therefore concluded it was not necessary to determine the reasonableness of the dismissal under section 98(4) of the ERA.

43. The Tribunal turned to consider the question of remedy. The claimant seeks compensation. The basic award is designed to compensate the employee for unfair dismissal by awarding him a sum almost equivalent to a statutory redundancy payment. The compensatory award is intended to reflect the actual losses that the employee suffers as a consequence of being unfairly dismissed.

44. The basic award is calculated in units of a week's pay. The total usually depends on the employee's age, length of continuous service and the relevant amount of gross week's pay. At the date of dismissal, the claimant was 35 years of age. He had been continuously employed by the respondent for three years. The claimant's entitlement was three week's pay restricted to the statutory maximum at April 2019 of £525 per week, that is £1,575.

45. The Tribunal them considered the immediate loss of earnings from the date of dismissal until the date of the final hearing. The claimant had resigned with effect from 23 August 2019. The Tribunal therefore calculated his immediate wage loss as 3.7 weeks net pay. The Tribunal was provided with a figure for gross weekly wage of £711 but not net weekly wage which it calculated at £556.36, that is £2,058.53.

46. The Tribunal did not make any award in respect loss of statutory rights as the claimant had already decided to resign.

47. The total monetary award is £3,633.53 being £1,575 plus £2,058.53. There was no evidence of the claimant being in receipt of benefits following his dismissal given his trip to Europe. the Employment Protection (Recoupment of Jobseekers Allowance and Income Support) Regulations 1996 do not apply.

48. The Tribunal next turned to consider the claimant's breach of contract claim. On 1 July 2019 the respondent gave the claimant four weeks' notice of termination of his employment on 29 July 2019. The respondent therefore did not breach the claimant's contract of employment by failing to give him notice.

49. The claimant's breach of contract claim is therefore dismissed.

Employment Judge: Shona MacLean
Date of Judgment: 15 October 2020
Entered in register: 02 November 2020
and copied to parties