# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Peter Lapage

**Respondents:** (1) Burgess Hodgson LLP
(2) Burgess Hodgson Services Ltd

**Heard at:** Croydon Employment Tribunal

**Before:** Employment Judge Michell (sitting alone)

**Appearances:**

For the claimant: Mr Emslie-Smith (counsel)
For the respondent: Mr Tapsell (counsel)

# WRITTEN REASONS

## INTRODUCTION

1. I gave oral judgement in this case, which was a claim of wrongful dismissal and unfair dismissal, at the conclusion of a two day CVP hearing on 17 & 18 March 2021. I dismissed the claims. The respondent has now applied for written reasons. My reasons, already given orally to the parties, are set out below.

## REASONS

### Factual findings

2. The second respondent[1] ("the respondent") is a chartered accountancy business. It has about 130-140 employees. At all material times, the claimant worked for the respondent as an office manager. He dealt with -amongst other things- credit control, debt collections, petty cash, and client file management. He was trusted with confidential information, and with sensitive partnership details.

[1] The claimant against the first respondent was dismissed upon its withdrawal.

3. On 7 June 2019, a colleague in payroll, Mr Gibson, resigned. This was because he had found a better paid job elsewhere. Mr Gibson was offered that new role on 6 June. He had been asked in his interview how long his notice period was, and had told his prospective new employers that the notice period was negotiable. This, as it proved, was optimistic. In fact, Mr Gibson had a 13 week notice period. That was quite a long time. However, Mr Loughton told me and I accept that this was because individuals performing payroll functions could prove particularly hard to replace. Mr Gibson did not want to serve that period of notice. He considered that the new role would not remain open to him for that length of time. He was concerned not to lose it.

4. Mr Gibson had discussions with the respondent. He made it clear that he did not want to serve out his notice. The respondent made it very clear that it expected him to do so. Discussions were therefore somewhat heated or strained.

5. The claimant knew Mr Gibson. The claimant had introduced Mr Gibson to freemasonry, and Mr Gibson was now a member of the same lodge as the claimant. The claimant wanted to assist Mr Gibson.

6. The claimant knew that Mr Gibson did not want to serve out his notice. He was of the view that if Mr Gibson did not do so, the respondent would not give Mr Gibson a reference to the new employer.

7. Mr Gibson had secured the new role via a recruitment agency, "Adecco". On 12 June 2019, a Morgan Vinali from Adecco wrote to the claimant directly. She did so because Mr Gibson had asked her to do so, rather than to contact the respondent directly about a reference. Her email says:

> *"…I'm looking to obtain a reference for Thomas Gibson hopefully you can assist me with this. Please see attached our candidate reference form. If you could come back to me with as much information as possible that would be great…"*

8. There is nothing in that email which suggests that the request for a reference had no bearing on whether or not the job offer which had been made to Mr Gibson

would remain 'on the table'. Indeed, on the face of the email, the request for a reference appears to be an integral part of the job offer process.

9. Upon receiving Adecco's email, the claimant wrote to Mr Gibson. He said to him:

> "…*we need to discuss this. There is a problem as I cannot give a reference in the name of Burgess Hodgson. Let's talk about it in the morning as I have an idea*…".

10. Thereafter, the claimant drafted up a reference for Mr Gibson. He did so using the respondent's computer, and during office hours, but sent it from his personal (business) email account. The first draft of that reference states:

> *"… I understand from Tom that he's had a discussion with you concerning a reference from his current employer. I can confirm that it is not the policy of Burgess Hodgson LLP to give…*".

11. The last sentence was omitted from the finalised version of the reference. The claimant was not entirely sure what it referred to. In my judgement, the likelihood is that it was intended to refer to the fact that Burgess Hodgson did not generally give references. However, the claimant thought better of this addition, which was not accurate.

12. Instead, the reference he writes (from a personal email address accessed via the respondent's IT system) says:

> "… *thank you for your message I understand from Thomas that he had a discussion with you concerning a reference from his current employer which I can confirm is correct..."*

13. Again, the claimant was not able to explain what that discussion exactly was. It may well have been to the effect that the respondent would not be likely to give a reference in circumstances where Mr Gibson was proposing not to serve out his notice.

14. The reference then continues:

> *"Nevertheless*

*I have known Thomas Gibson in a professional and personal capacity for some time. Unfortunately I can't be exact as to how long I've known him but it is well over a year.*

*From what I witnessed in his professional capacity Tom is accurate extremely well presented and exhibits a good work ethic. His time keeping is excellent. He gets on well with people is approachable most polite and wel [sic].*

*In his personal life he is a popular young man and immensely likeable. He has a social conscience and is actively involved in a large Kent-based charitable organisation. He is married to Sofia and while they have no children to his immediate family [sic]. In short Tom is a pleasure to know.*

*I do hope this assist you and if I can be of further assistance please do let me know…"*

15. The reference is therefore curiously worded. It did not purport to be from the respondent. But it gave some details as regards Mr Gibson's professional abilities, as well as his personal attributes. As I read it, it was intended to sail as close to the wind as it could do by what of being a hybrid professional and personal reference, in circumstances where the claimant knew the respondent would not countenance the giving of a reference and that he could not expressly write the email in the respondent's name. It was intended to tick at least some of the boxes which Adecco appeared to want to have 'ticked', and which the respondent would not have done.

16. As it transpired, Adecco did not in fact need the reference in order to complete Mr Gibson's hiring by the new employer. However, as the claimant candidly accepted in his evidence, the claimant was not aware of this fact at the time. Rather, he understood the reference to be something to assist Mr Gibson in getting and keeping his new job, although that meant Mr Gibson would leave early and in breach of contract.

17. On Friday 2 August 2019, Mr Gibson left the office for the last time. He did not return. On 5 August 2019, the claimant told the respondent that he had spoken to Mr Gibson that weekend, and that Mr Gibson was not returning.

18. As can be seen from the letters the respondent wrote to both Adecco and the new employer, the respondent was very unhappy at this development. It considered it unprofessional and wrong for the new employer to have hired Mr Gibson, notwithstanding Mr Gibson's failure to honour his contract.

19. The respondent checked Mr Gibson's and the claimant's computers and emails, as it was entitled to do under the relevant internal IT policies. It found both the sent and draft reference. It also found evidence of regular non-work related activity on the claimant's computer. This, despite the respondent's communication and IT usage policy, which provides that the equipment ought not to be used for personal purposes "*except in reasonable and sensible circumstances*".

20. The claimant was invited to a disciplinary meeting on 9 August 2019, under cover of a letter dated 8 August which set out various investigatory findings by Mr. Jones, and which provided copies of assorted relevant documentation. This included the reference, and about 50 pages of print outs showing (amongst other things) the claimant; s repeated accessing of his "southernstar.biz" email inbox whilst during work hours. The letter gave the claimant very little time for preparation. However, I accept Mr. Jones's evidence (which the claimant did not challenge) that if the claimant wanted more time it would have been allowed him. In fact, the claimant did not ask for additional time, and declined the offer which was made to him to take the rest of 8 August off for preparation.

21. At the 9 August meeting with Mr Sutton (partner), it was put to the claimant that he had enabled Mr Gibson to breach his contract. In reply, the claimant asserted that he was only doing what the recruitment agency had told him, and the reference was "just a formality". However, by that time at least, neither Mr Gibson nor the claimant were of the understanding that the reference was irrelevant to

the recruitment process, or Mr Gibson's ability to start at his new employer. Quite the contrary.

22. When it was put to the claimant at the meeting that he was trying to get Mr Gibson "*around an issue*" (in other words, the need for a reference), the claimant said he understood this "extremely well "and accepted that he had made a "*huge error of judgment*". He apologised for the "*breach of confidence*".

23. When asked questions about this before me, the claimant denied that he had done anything "sinister". However, he did candidly accept that his actions were "underhand", even though they were intended to assist Mr Gibson.

24. He also accepted that his (regular and repeated) use of the respondent's computer systems to access personal emails etc (as well as to send the reference) during office hours was contrary to the provisions of the staff Handbook.

25. On 14 August 2019, the claimant and Mr Sutton met, for Mr Sutton to give his decision. The claimant was told that "*going against the partnership*" was the main breach. In other words, the claimant chose to provide the reference in circumstances where he knew the respondent would not do so, and where he understood the reference was part of the recruitment process in circumstances where Mr Gibson was intending to leave in breach of his notice obligations. That was why – as Mr Sutton pointed out to him- the claimant made no attempt to check with the respondent before sending his reference. This was, as I find, because he knew the respondent would not want him to send it.

26. Mr Sutton set out the reasons for his decision in a letter of the same day.

27. Mr Sutton does not set out in that letter the fact that he had duly considered matters which might serve to mitigate the seriousness of the misconduct. He usefully ought to have done so. However, I accepted his evidence that he did consider such matters, only to decide they did not sufficiently exculpate the claimant.

28. The claimant appealed his dismissal. In his appeal letter, he mentions a 'comparator'. Mr W, who had apparently been dismissed for dishonesty. The respondent considered, and I agree, that the circumstances of Mr W's case were not analogous. In any event, as I have said, Mr W was also dismissed.

29. The appeal was heard by Mr Laughton (partner) on 22 August 2019. At the hearing, that claimant said he had since been told that the reference was not a prerequisite of employment. (This was in fact confirmed to the respondent by Adecco on 23 August 2019.)

30. Mr Laughton put it to the claimant that at the point he gave the reference, it nevertheless appeared that Mr Gibson and the agency needed the reference. The claimant confirmed that this was the case. Mr Laughton's notes record - accurately, as I find- the claimant accepting he "*understood that in the absence of the reference [Mr Gibson] may not be appointed to his new job*".

31. I accepted Mr Laughton's evidence to the effect that he double-checked this point with Ms Pottle (who had been present and taking notes at the appeal meeting), and that she confirmed to him this was what the claimant had said.

32. Mr Laughton therefore concluded that the claimant's intention in writing the reference had been to facilitate Mr Gibson's early departure from the respondent, notwithstanding his knowledge that Mr Gibson aimed thereby to leave in breach of contract by not serving notice. Mr Laughton was of the view that such actions amounted to (in effect) a breach of the implied term of trust and confidence, especially given the degree of confidence placed in the claimant by virtue of his position.

33. In his 28 August 2019 decision letter, he therefore upheld the original dismissal decision. He also points out that the reference "*specifically deals with matters which would have been covered in an employer reference*" - in other words, Mr Gibson's performance at work, time keeping etc.

34. Again, I accepted Mr Laughton's evidence that he did give consideration to potential points in mitigation. In fact, the handwritten blue notes on his appeal

investigation document specifically refer to "mitigating factors". It would be odd for him to have written this, if in fact he gave such matters no thought at all.

**Relevant law**

35. Wrongful dismissal: The burden of proof is on the respondent to show a repudiatory breach on the part of the claimant. Any breach of the implied term of trust and confidence is, by definition, repudiatory. Both parties to the contract are obliged not, without reasonable and proper cause, to conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Breach cannot be made out by any act of simple misconduct etc. It must (objectively construed) be sufficiently serious to amount to such a breach, going to the fundamentals of the parties' relationship. See for example **Morrow v. Safeway Stores Ltd** [2002] IRLR 9, EAT.

36. Unfair dismissal: It is for the respondent to establish a potentially fair reason for dismissal. If it does so, tribunal must then consider whether not the dismissal was fair, taking into account all the circumstances. The test is not what the tribunal would have done. Rather, it is whether or not dismissal was within the band of reasonable responses. In contrast to a wrongful dismissal claim, actual misconduct is not needed (still less, repudiatory breach). Rather, the respondent must have reasonable belief, founded on a reasonable investigation, in the fact of misconduct.

**Application to facts**

Wrongful dismissal

37. I have not found this an easy case to decide. I had some sympathy with the claimant. On the one hand, the claimant did not purport to write the reference on behalf of the respondent. He had not been told not to write a reference. There was no specific policy banning him from doing so. As it transpired, the reference was not necessary in order for Mr Gibson to both secure and commence his new job. Also, as it transpired, Mr Gibson was replaced on the same day that he did not turn up to work.

38. However, against that, the claimant was in a trusted and relatively senior position. He knew that Mr Gibson planned to breach his period of notice. He knew that was a considerable concern to the respondent. He knew the respondent will therefore not give Mr Gibson a reference. He understood that Mr Gibson needed a reference in order to secure the new job. He did not ask the respondent if it was appropriate for him to write on this to Gibson's behalf -because, as I have found, he well knew what the answer to that question would be. And the reference he wrote was something of a hybrid. It was not a simple 'purely personal' reference. The intention of writing it was to facilitate Mr Gibson's departure, in breach of contract. The intention was not malicious. but it was underhand. It did indeed 'cut across' the partners, as the claimant knew it would. This, even though the intention was largely benign- in other words, to help Mr Gibson.

39. Given the position of considerable trust and responsibility which the claimant accepts he held, I find that his actions amounted to a breach of the implied term of trust and confidence, seriously damaging the respondent's trust in him.

40. There have been many far more serious instances of breach of that term. Insofar as I had been persuaded that the claimant's conduct in relation to the reference did not amount to breach of such a term, but was 'near the cusp', the claimant's misuse of the respondent's IT systems for his personal emails etc might very well have tipped the balance -even though (as the respondent sensibly accepted in evidence) such misuse would not of itself amount to a repudiatory breach.

Unfair dismissal

41. The reason for the claimant's dismissal was indisputably potentially fair- i.e. conduct. The claimant did not seek to argue otherwise.

42. The fact that the claimant was (as I have found) in repudiatory breach does not mean his dismissal was therefore fair. However, in the circumstances, I do think it was within the reasonable range of responses for the claimant to have been summarily dismissed.

43. As regards process, it was short. However, an investigation was carried out. The claimant was given the investigation's findings. The claimant did not ask for more time. Had he done so, or had he asked for further information, he would have been given it. In fact, most of the factual substance of the allegations was not in dispute.

44. If, contrary to my primary findings, the dismissal was in fact unfair, I would have made a significant reduction for contributory fault (and Mr Emslie-Smith sensibly conceded that a reduction, albeit he said “of no more than 50%”, would have been apt). However, that point did not arise.

Employment Judge Michell
Date: 27 March 2021