Case Number: 3312608/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr B Julian	**v**	ITM Communications Ltd

Heard at: Cambridge (by CVP/In person) **On:** 18 May 2021

Before: Employment Judge N Hanning

Appearances
For the Claimant: In person.
For the Respondent: Mr R Hignett (Counsel).

JUDGMENT

1. The respondent wrongfully dismissed the claimant and is ordered to pay the claimant damages in the net sum of £400.

REASONS

The Claim

1. On 25 February 2020, the claimant accepted an offer of employment with the respondent as a Service Desk Co-ordinator which had been due to start on 23 March 2020.

2. Unhappily, 23 March 2020 proved to be the start of a national lockdown in response to the COVID-19 pandemic. Because of the pandemic, the claimant's start date was deferred and in the end he did not begin to work for the respondent until 23 June 2020 and that was in a different role.

3. On 19 August 2020, the claimant's employment was ended and he brings this to recover his salary and other employment benefits which would have accrued to him had his employment started on 23 March 2020 as intended.

The Issues

4. There being no dispute but that the parties had entered into a binding contract which was due to start on 23 March 2020, the issues to be determined were:

   4.1 What was the legal impact of the respondent deferring the claimant's start date? The respondent submitted that there were 4 possible conclusions which I set out in a slightly different order:

      a) The contract was ended by the legal doctrine of frustration

      b) The contract began on 23 March 2020 but the claimant was not required to work

      c) The parties agreed to vary the contract by deferring the start date

      d) The deferral was a termination of the contract by the respondent

   4.2 Having regard to the determination of 4.1, what, if any, damages are recoverable by the claimant?

The Relevant Law

Frustration

5. The modern concept of frustration was stated in the following terms by Lord Radcliffe in *Davis Contractors Ltd v Fareham UDC* [1956] AC 696:

> "[F]rustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do."

6. The doctrine has been considered in a number of employment related cases from the over-arching message is that it is a doctrine which is applied sparingly. It will apply where an employee dies and may apply where a personal employer dies. It may also, but not always, apply where an employee is imprisoned.

7. Each case will turn on its own facts but as a matter of principle Tribunals should be alert to the doctrine not being relied on as a means of avoiding liability for the consequences which would otherwise flow from a dismissal.

8. That is important because, where a contract of employment has been frustrated, the contract has been terminated by operation of law and will not amount to dismissal entitling the employee to make a claim of unfair dismissal. In addition, owing to the lack of culpability of either party, neither may bring a claim for damages caused by the termination.

Agreement to Vary

9. Starting the contract but permitting the claimant not to attend or deferring the start date by agreement both amount to a variation of the contract.

10. The principles which apply to the formation of a contract apply to an agreement to vary the terms of that contract. Therefore, for a variation to be effective there must be consensus between the parties as to the terms of the variation. It will be a question of fact in any case to determine whether the parties have agreed to a variation.

11. If a variation is not agreed, then the imposition of the change will amount to a breach of contract. That breach may entitle the innocent party to damages and may also lead to the termination of the contract.

Termination of Contract

12. As a general rule, where there is a breach of contract, that does not of itself bring the contract to an end. However, the general law of contract is that a party to a contract may elect to treat the contract as at an end if the other party commits a repudiatory breach of contract.

13. A 'repudiatory' breach is one which is fundamental, that is to say it goes to the heart of the contract. It is a breach that is so serious that it may legitimately be viewed as amounting to a signal that the offending party no longer wishes to adhere to the contract at all.

14. There have been differing views as whether the innocent party must elect to accept the breach as bringing the contract to an end or whether the breach brings the contract to an end automatically. Notwithstanding a powerful dissenting judgment from Lord Sumption, the majority decision of the Supreme Court in *Geys v Societe Generale, London Branch* [2012] UKSC 63 was that in the case of a repudiatory breach by an employer, the contract does not terminate automatically. An employee has the option to allow the contract to continue notwithstanding the repudiatory breach and so must either accept the repudiation or do something which is inconsistent with continuation of the contract before it ends.

15. Whether the breach is so serious as to be repudiatory or not and whether the employee has expressly or by implication accepted that repudiation or not is a question of fact.

16. Where an employer is guilty of a repudiatory breach and the employee accepts that repudiation, the contract of employment is brought to an end. In such circumstances, the employer will be in breach of the contract of employment in so far as they has failed to terminate the employment as permitted by the terms of the contract.

17. This is a breach known as 'wrongful dismissal'. It is distinct from the concept of 'unfair dismissal' which is a statutory construct which only applies to employees who have the requisite period of employment (currently 2 years so of no application in this case).

Damages for Wrongful Dismissal

18. The remedy for wrongful dismissal is to put the employee in the position they would have been in had the contract been properly performed by the employer lawfully terminating the contract.

19. The employee is therefore entitled to compensation for all the benefits that they would have received had they remained employed until the end of their notice period (or, in the case of a fixed term contract, until the contract was due to expire).

20. There is no entitlement to additional or future wages founded on the proposition that the employee has been denied the chance to work and earn those wages. In assessing damages, the employer is to be assumed to perform the contract in the way least burdensome to it. See *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278, [1966] 3 All ER 683 and *Geys v Societe Generale, London Branch* already referenced.

The Evidence

21. The claimant appeared in person and was physically present in the Tribunal hearing room in Cambridge. The respondent was represented by Mr Richard Hignett of Counsel who attended remotely via CVP. I am grateful to both for the courteous and helpful manner in which they presented the cases and made their submissions.

22. I heard evidence from the claimant on his own behalf and from Kaley Tighe, Senior Finance and Payroll Co-ordinator, and Carl Fegan, Customer Services Director, for the respondent both of whom gave their evidence remotely. There was in truth little, if any, conflict of facts and I found all the witnesses to be truthful and doing their best to help the Tribunal.

23. Owing to there having been some difficulties in the parties being able to agree a single bundle and its mode of delivery, I also had access to two bundles of documents; one from each party. This was not entirely helpful but it did not hamper our combined ability to deal with the evidence and address the issues.

Findings of Fact

24. The following findings of fact have been reached by me, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account my assessment of the witness evidence.

25. Only findings of fact I consider to be relevant to the issues to be determined, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute or to refer to every document I read or was taken to. That does not mean it was not considered if it was referenced to in the witness statements/evidence.

26. As already recorded and accepted by the respondent, a contract was formed on 25 February 2020 when the claimant accepted an offer of employment with the respondent as a Service Desk Co-ordinator. It was a term of the contract that the claimant would start work on 23 March 2020

27. Relying on that agreement, the claimant resigned from employment he had held with Royal Mail for over 2 years and which had offered significant ancillary benefits including a generous pension scheme. His employment with Royal Mail came to an end on 21 March 2020.

28. The material terms of the contract were that he would be paid £26,000pa. After 3 months' employment he would be enrolled into the respondent's pension scheme into which the respondent would make contributions of up to 5% of salary. The first 6 months of the employment would be a probationary period during which either party was entitled to terminate the contract on 1 week's notice.

29. Those plans were ruined by the impact of the COVID-19 pandemic. As we now know, 23 March 2020 proved to be the start of a national lockdown under the terms of which nearly everyone was required to stay at home.

30. On learning of the impending restrictions, on 20 March 2020, the respondent contacted the claimant to explain that they would not be able to accommodate a start date of 23 March 2020. The reasons for this were explained by Mr Fegan, whose evidence I accept. Summarising, the respondent knew it was going to have operate with a skeleton staff in the office and consequently there would be no functionality to provide the necessary induction training and supervision. These issues evolved over time such that by June the respondent had developed alternative procedures and systems and so was better able to accommodate new starters.

31. In the meantime, the respondent did offer to help if it could. It investigated the question of whether, if he started, the claimant would be eligible to be furloughed. The respondent took the view that he could not be. The claimant expressed a different view but it is not necessary for me to decide that issue because, it is clear, the claimant did not in fact take up employment with the respondent at that time.

32. This much is obvious because, after the start date was deferred, the claimant asked his former employer, Royal Mail, if they would agree to the retraction of his notice and reinstate him. Unfortunately they were unable to accede to this request.

33. In addition, perfectly sensibly in view of his position, the claimant did not sit idly by but, from 4 May 2020, secured some temporary work through an agency.

34. As contact remained in place with the respondent, in June 2020 he was invited to apply for another position with the respondent. This was far from ideal as it was a different role, that of a Service Desk Technical Support

Officer, and, for the time being at least, on less favourable terms owing to the pandemic situation. Nevertheless, again to his credit, the claimant applied and was successful. He was eventually able to start work on 23 June 2020.

35. Regrettably the role did not work out and during the course of his probationary period the respondent decided not to retain the claimant's services. He was dismissed on 19 August 2020 and was paid one week's pay in lieu of notice.

36. There appear to have been some challenges to the amounts the claimant was paid during that employment or on its termination but I do not need to be concerned with those.

37. This claim was confined to a claim for wages, accrued annual leave and pension loss for the period between 23 March and 22 June 2020; the gap between his expected start date and his actual start date of 23 June 2020.

Submissions

38. Mr Highnett provided a helpful skeleton argument which fairly suggested all the possibilities outlined above. He admitted to frustration being a possibility but without much conviction to my mind. He argued that there was no evidence from which to find there was a contractual variation to defer the start date or that the claimant was actually taken on but not required to work. He invited me to find that the contract had been terminated in March 2020 and that there was no need for the claimant to consent to that termination by dint of the minority judgment in *Geys*.

39. The claimant made the entirely valid point that he had relied critically on the agreed contract of employment with the respondent in resigning from his position with Royal Mail. There was nothing in the contract which allowed the respondent to defer the start date so it was reasonable for him to rely on it. By contrast it was wholly unreasonable for him to get nothing at all for the respondent's breach of contract.

Conclusions

40. I do not find that the contract was frustrated. At the time of the deferral of the start date no one knew for how long the restrictions might apply and I do not consider it is possible to find that the contractual obligation had become 'incapable of being performed'.

41. At worst the obligation was being deferred for a period but the view at the time was that the employment would be implemented at some point in the future. It was too early to say that it was incapable of being performed because ways of working from home were still be being developed and in any case the main barrier at this point was a temporary inability to undertake induction and training. That was a barrier which the respondent expected to overcome in the future.

42. I also reject the proposition there was any consensual variation of the contract. The claimant never sought to argue that he agreed to the start date being deferred; to the contrary he made it clear he was unhappy with the situation and pressed the respondent to start his employment at the earliest opportunity.

43. For its part, it is clear the respondent never started the claimant's employment. The contemporaneous communications make it clear his employment was not beginning but was being deferred to an unspecified future date. The claimant's actions in seeking reinstatement with Royal Mail and taking up other work demonstrate he did not consider himself to have started his employment with the respondent. And the requirement to make a fresh application and be interviewed for a different role is clear evidence that the original role had not been started.

44. I accept the respondent's submission and that of the claimant too, that in deferring the start of the employment the respondent was in breach of contract.

45. There can be no more fundamental a term of an employment contract than the ability to work and be paid. I am therefore satisfied the breach was repudiatory and entitled the claimant to accept the repudiation and treat the contract as ended.

46. I do not consider I may legitimately prefer the minority judgment of the Supreme Court to the majority judgment. I am bound to follow the decision in *Geys* and adopt the view that the claimant had to accept the breach either expressly or by implication.

47. I find that the claimant did accept the breach and did not affirm the contract in spite of the breach. While he clearly did not do so in those precise terms, that is hardly surprising given that it is a technical legal point which neither party was actively considering. However, his actions were completely at odds with him affirming the existence of the contract.

48. As noted above, he sought reinstatement with Royal Mail and took up other work. He applied for the new role with the respondent. None of those actions is consistent with a position of affirming that the agreed contract had not been ended.

49. I therefore find that the respondent terminated the contract by its repudiatory breach of contract. It did so in breach of contract in that it failed to give the claimant any notice of termination as was required.

50. Regrettably, as set out earlier, that is of limited help to the claimant as the measure of loss is limited to the week's notice which he should have been given. There is no basis in law on which he is entitled to recover wages or other losses for the whole of the period during which he expected to be employed.

51. In terms of pension loss, any claim would have been founded on that which he would have earned with the respondent so the claim based on his Royal Mail pension was wrong in principle. However, as he had no entitlement to any pension contributions until he had been employed for 3 months, he can claim nothing in respect of the one week's notice period.

52. I also considered what annual leave might have accrued during the one week of notional employment but that falls away because annual leave only accrues up to the date of termination (see Reg 14 of the Working Time Regulations) and so does not accrue during a period of notice which is not worked.

53. The claimant's claim is therefore capped at one week's net pay. His gross was £26,000pa which is £500pw. There was no disagreement between the parties to assess the net loss after allowing for tax and NIC at £400 and that is the amount I award.

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Employment Judge N Hanning

Date: 18 June 2021

Sent to the parties on: ...22 June 2021..
THY
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For the Tribunal Office