



EMPLOYMENT TRIBUNALS

Claimant: Mr J West

Respondent: Alith Vore Consulting Limited

Heard at: Watford ET by CVP
Before: EJ Cowen

On: 9 February 2021

Representation:

Claimant: Mr J West, In person

Respondent: Ms Rynehart, solicitor

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals.

“This has been a remote hearing. The form of remote hearing was by CVP. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to were provided by the parties and I have recorded the contents which I have referred to.

RESERVED JUDGMENT

- 1 The Claimant is awarded £57,098.95 (fifty seven thousand, and ninety eight pounds and ninety five pence) in compensation for his unfair dismissal, wrongful dismissal, unlawful deduction of wages and holiday pay claims.

REASONS

Introduction

1. By way of a claim issued on 18 July 2019, the Claimant claimed unfair dismissal, wrongful dismissal, holiday pay and unlawful deduction from wages from his employment for the Respondent. On 2 April 2020 EJ Daniels made deposit orders in respect of the claims. The Respondent failed to make the deposit payments and judgment was entered on 24 June 2020 for the Claimant with respect to;
 - i) Breach of contract in respect of notice pay
 - ii) Unlawful deduction from wages regarding a) salary and b) pension
 - iii) Constructive dismissal
 - iv) Unfair dismissal
 - v) Holiday pay

2. The case was listed in respect of remedy and heard by CVP online hearing, on 9 February 2021. The listing of the hearing did not provide sufficient time to deal with submissions and the parties agreed to provide their submissions in writing.
3. The Tribunal was provided with a joint bundle of documents and received a supplemental bundle during the hearing. Witness statements were provided by the Claimant, Mr Burden and Mrs Burden and oral evidence was heard from all three of them.

The Facts

4. The Claimant was employed under a contract of employment by the Respondent recruitment agency, until he resigned on the basis of constructive unfair dismissal on 29 May 2019. The Claimant had worked for True North Human Capital Limited ('True North'), from 1 December 2010. This predecessor company was owned and run by Mr Burden, with Mrs Burden employed as Head of Marketing. The company was placed into voluntary liquidation in December 2018. The Respondent was TUPE transferred from True North to the Respondent, a company owned by Mrs Burden as sole Director and shareholder, on 7 December 2018. The Claimant therefore had worked with Mr and Mrs Burden for some 8.5 years at the time of his resignation.
5. Prior to working for True North, the Claimant had owned and run his own company called The Search House between 2006 and 2009. It ceased trading in 2009 and was a dormant company in 2010. It received a rebate from HMRC which showed on the 2011 accounts. The Claimant had de-registered the company from both the Information Commissioners Office and VAT, prior to starting work for True North. He wanted to keep the company name for any future venture and so continued to file accounts as required. On the basis that The Search House was a dormant company and not trading, the Claimant did not inform Mr or Mrs Burden about it. The company was not trading and was not a competitor of True North or the Respondent during the period in which the Claimant worked for them.
6. The Claimant was also a shareholder of another company called Superscout Ltd at the time at which he worked for the Respondent. He declared this to Mr Burden when he was offered the position with True North. When he wrote to Mr Burden, the Claimant gave his assurance that his continuing to be a shareholder and Board member would "*not involve me in any day-to day activities or require my time*". This was clearly accepted by Mr Burden, as the employment went ahead.
7. When he joined True North, he did so as Client Services Manager and reported to Marc Moreau, who at that time was not a director of the company, although he became a director at a later date. The Claimant was perceived by the Respondent as being in a senior position. Whilst he was an experienced recruiter, he was an employee with no managerial responsibility or status on the Board at True North.

8. The Claimant received a contract when he commenced employment with True North Human Capital Limited. The terms of the contract said, amongst other things, that he would be paid monthly by bank transfer; he would be entitled to become a member of the company's group life and income protection policies; that reasonable expenses would be reimbursed in accordance with the company policy and that an employee should not *"Directly or indirectly enter into or be concerned or interested in any trade or business or occupation whatsoever other than the business of the company, except with the prior written consent of the Board"*. The contract also set out *"the employee is responsible for any property belonging to the company which is in his/her control or possession and he/she must take proper care of such items"*.
9. The Claimant did not join the company private medical health scheme, but did benefit from cover under the Company's life assurance and income protection schemes.
10. The Respondent asserted that the Claimant was running his own competitive business whilst he was employed by the Respondent. As set out above, the company was dormant. In any event, this was not an issue which was raised with the Claimant by either Mr or Mrs Burden during the Claimant's employment and which neither of them was aware of, until after the Claimant's resignation. Mrs Burden's evidence was that had she known at the time she would have asked for undertakings by the Claimant not to carry out work for them. This indicates that Mrs Burden trusted the Claimant not to act in competition, whilst he was employed by the Respondent. Mrs Burden's assertion that the Claimant only worked for the Respondent in order to receive the money he was owed and build up client contacts so that he could relaunch The Search House, was without any evidential support.
11. Likewise, towards the end of the Claimant's employment with True North, when it seemed that the company may not survive, the Claimant took steps to copy information from the company's LinkedIn account. This was sent to his True North company email and therefore remained the property of True North. Mr and Mrs Burden assert that they knew on the weekend prior to the Claimant's resignation that he had copied this information, but did not confront the Claimant about it. Nor did they email the Claimant about it after his resignation despite the fact that they were in communication by email during June and July 2019. This was also not mentioned in the Respondent's Grounds of Response to the claim, nor listed in the Respondent's initial disclosure. I find that it was not discovered by the Respondent until some time during their preparation for this hearing.
12. Thirdly the Respondent asserts that comments made by the Claimant after his resignation about Mr Burden amount to coercive control. By this time the parties were engaged in a dispute over unpaid wages and dismissal.
13. The Respondent also asserts that the Claimant wiped two company laptops whilst still an employee of the company. The Claimant did remove his user profile from the laptops before returning them. He had been requested to return them by Mr Burden in response to the resignation email on 28 May

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2019. The way in which the Claimant had removed his profile meant that no historical data could be accessed. At the same time there was a problem with some of the company's CRM system. The Respondent asserts that this was not coincidental. The letter from A&E PC Repairs who were instructed by the Respondent says "*the deletion of the user profile coincided with a systems failure with the company's CRM system, which is accessed through the a (sic) Microsoft Windows application. This is a good example of the kind of operating difficulties that can occur*". This caused extra work and some delay to the Respondent being able to continue with the Claimant's work in progress.

14. Whilst the Claimant had worked well with Mr Burden for many years and they had been personally supportive of each other, their personal and business relationship broke down as Mr Burden felt that the Claimant was not as successful and productive as he once had been and the Claimant felt that he no longer trusted Mr and Mrs Burden due to a lack of regular payment.
15. By December 2018 the Claimant was chasing Mr Burden for payment of his salary, pension and evidence of the life assurance policy. Although he TUPE transferred between a company owned by Mr Burden, to one owned by Mrs Burden, the practical running of the company did not change and he continue to answer mainly to Mr Burden.
16. By February 2019 the money had still not been paid, despite negotiation between the Claimant and Mrs Burden. At the same time in February, Mr Burden began to encourage the Claimant to push harder on finding new work. The lack of payment was a disincentive for the Claimant, whilst the lack of work meant Mr Burden was less inclined to solve the cash flow problems for the Claimant.
17. By March 2019 the Claimant had entered into correspondence with Mrs Burden with regard to his lack of payment. In return, she was critical of the Claimant's lack of sales performance. The Claimant emailed both Mr and Mrs Burden to keep them abreast of his progress, but was criticised for not keeping them more closely informed of his work.
18. On 19 March 2019, the Claimant spoke to Mrs Burden about the fact that the Respondent had not made full contributions to his pension for some months. She spoke to him about his perceived underperformance and lack of 'pipeline' opportunities. This increasing wariness of each other led to the breakdown of what had been a successful working relationship, where both sides became increasingly cautious of the probity of the other.
19. On 18 April 2019 the Claimant submitted an expenses claim with copies of the receipts for which he claimed. These were submitted via software provided by the Respondent for the purposes of making such claims.
20. Clause 10 of the Claimant's contract says that the company shall "*reimburse all reasonable expenses wholly exclusively and necessarily incurred by him/her in the discharge of his/her duties under this Agreement and upon production of receipts or other evidence as reasonably required by the Company.*"

21. Reference is made to the company expenses policy. The evidence provided was a policy of True North Human Capital Ltd, the company from which the Claimant had TUPE transferred. This indicated that “ *the company will reimburse all approved and reasonable expenditure incurred in undertaking company duties*”.
22. In relation to mileage it says “*the company will reimburse business mileage at HMRC published rates...Journeys between home and work (commuting journeys) are not business journeys and will not be reimbursed (even for weekend working).*”
23. Ultimately the Respondent ceased to pay the Claimant his salary. This had happened previously when True North had sustained financial difficulties, but the parties had moved on together to the Respondent. Mr Burden spoke to the Claimant and reassured him that he would be paid when clients had paid some invoices, but this did not occur. Ultimately Mr Burden told the Claimant he would need to do another deal before he was paid. Having experienced this lack of pay before, the Claimant lodged a grievance about it on 15 May. This was not addressed by Mrs Burden. The Claimant then resigned in response to this.
24. Clause 12.5 of the contract said “*The Employee is responsible for any property belonging to the Company which is in his/her control or possession and he/she must take proper care of such items*”. It went on at 12.6 to say that; “*The employee shall as soon as possible upon the Company’s request; 12.6.1 deliver up to the company all property belonging to the company in his/her possession or under his/her control*”.
25. The Claimant had access to two company laptops during his employment. He returned these to the Respondent on 28 May 2019. The Claimant had wiped the laptops which he had used for business and some personal matters. they could not be accessed and had to be
26. After his resignation, the Claimant purchased his own life assurance at a cost of £61.92 per month for a term of 12 years.
27. The Claimant took steps in June 2019 to reinvigorate his business The Search House. He opened himself to offers on LinkedIn and had some conversations about potential lines of work, with other recruiters. He set up the business of The Search House once again. He did not receive an income from this business until March 2020. During its financial year to 31 May 2019, The Search House generated £9,119 in profit.
28. The parties were in agreement that the Claimant is owed his net salary for the months of April and May 2019.
29. The parties also agreed that the Respondent’s holiday year ran from 1st January to 31st December and that the annual entitlement to holidays was 27 days. The Claimant resigned on the 29 May. He had therefore worked for almost 5/12 of the year.

30. An email showed that on 13 December 2018 Mr Burden had agreed that the Claimant could “roll untaken 2018 holiday allocation into 2019”. The Claimant had three days to roll over. During 2019 he took seven days of holiday.
31. The Claimant went into hospital on 2 January 2019 for a minor operation. He was therefore off sick that day and the following day, but worked from home on 4 January 2019.

Law

32. In relation to damages for unfair dismissal the tribunal is under a duty to award a basic and compensatory award
s.123 Employment Rights Act 1996 states;
“(1) Subject to the provisions of this section...the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer”
33. The tribunal is allowed to consider whether the Claimant’s actions contributed towards his dismissal. *Polentarutti v Autokraft Ltd* [\[1991\] IRLR 457](#), [\[1991\] ICR 757](#), set out that constructive dismissal and contributory fault are entirely distinct concepts, and there can be a reduction of compensation as much where the employer has discharged the onus of showing what was the reason for dismissal as where he has failed to do so.
34. The size of the reduction in damages is that which the Tribunal considers just and equitable; s.122(2) ERA. The Tribunal must consider the Claimant’s actions to be “*culpable or blameworthy*”.
35. The tribunal cannot hold that an employee’s conduct is blameworthy where the misconduct is not discovered by the employer until after the dismissal; *W Devis v Atkins* [1976] IRLR 428.
36. The Tribunal may also consider whether the Claimant would have been dismissed lawfully in any event, if a proper process had been followed, *Polkey v AE Dayton Services Ltd* 1988 ICR 142, HL. The Tribunal is entitled to consider the chances of the Claimant continuing to work for the Respondent if circumstances had been different. In doing so the Tribunal must take into account all the evidence presented to it; *Software 2000 Ltd v Andrews and ors* 2007 ICR 825, EAT
37. S.13 ERA states that
“An employer shall not make a deduction from wages of a worker employed by him unless—
(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or
(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.”

21. This may apply to any amount which is said to be 'wages' and therefore covers, salary, holiday pay, notice pay, but does not include expenses claims (this can be brought as a breach of contract claim where the employment has terminated). The Claimant must prove that the amount was due and owing and remains unpaid.

Decision

38. *Terms of Contract*

The Claimant had a contract of employment with True North. He also benefitted from their life assurance and income protection policies. All of these terms and conditions transferred with him to the Respondent on 7 December 2018. During the negotiation between the Claimant and Mrs Burden, she assured the Claimant he would be paid for money outstanding which had not been paid by True North. In return she wanted the Claimant to change his remuneration package to reflect a reduced basic salary and a higher level of bonus. The Claimant was reluctant to do so and there was therefore a tension between the Claimant and Mrs Burden as to whether the Claimant was prepared to work on her terms. No new contract was provided or signed and therefore the Claimant continued to work to the terms of the contract as it had been at True North.

39. Throughout the time that the Claimant worked for the Respondent he continued to request money which was owed to him by True North which Mrs Burden had said would be paid to him. Over time, as the money was not paid and excuses were made, he became less inclined to put effort into his work on behalf of the Respondent. This was a source of conflict between the Claimant and Respondent. Ultimately the Claimant resigned due to the fact that he had not been paid and that further reasons were given to him, together with increasing criticism of his work, which led him to believe that it was not likely that he would be paid in line with his contract (i.e monthly) in the future.

40. *Unlawful Deduction from Wages*

The parties agreed that the Claimant was owed his salary for April and May 2019. A claim for unlawful deduction of wages is awarded net of tax and national insurance contributions as this is the amount the Claimant would have received. The amount he is owed is £8776.27.

41. *Notice Pay/Breach of Contract*

The Claimant resigned with immediate effect from his employment. This was an unfair dismissal and breach of the implied term of trust and confidence. As a result of this breach the Claimant did not receive his contractual notice pay, of 12 weeks, this would have expired on 21 August 2019. The Claimant's net weekly pay was £1,054.54 and therefore an award of £12,654.48 is made.

42. *Unfair Dismissal*

The parties agree that compensation is due to the Claimant for his unfair constructive dismissal. If the Tribunal considers that the Claimant contributed towards his dismissal by way of his behaviour prior to his dismissal, then a

reduction in both the basic and compensatory awards can be made.

43. Prior to the dismissal, the Claimant's enthusiasm and passion for his work was not as clear. The Respondent asserted this was due to his commitment to setting up his own business. In fact it was due to the Claimant's increasing concern and despair at the cash flow problem he encountered due to the Respondent not paying him regularly.
44. The Respondent asserts that the Claimant was in breach of his contract at clause 4.4 by way of failing to disclose that he was a director of The Search House during his employment. They assert that this amounts to blameworthy conduct, which should reduce his compensation.
45. Whilst it is right that the Claimant was a director of The Search House and that such a position falls within the meaning of the clause of the contract, it must be borne in mind that the company was dormant at the time. By which, I mean that it was not trading. The only action taken by the company was to receive a tax rebate from HMRC which was paid to the Claimant. The company was neither actively looking for work, nor servicing any work during the period that the Claimant worked for the Respondent.
46. The Respondent has failed to show any evidence to suggest that the Claimant's status as a director/shareholder of The Search House led to any actual or potential conflict with his work for the Respondent.
47. The Respondents were not aware of the fact that the Claimant was a director of The Search House until after his dismissal. This was admitted by Mrs Burden in her evidence. This cannot amount to a breach of a contract of employment which had terminated by the time the breach was known by the Respondent. It was not a matter for which the Claimant could have been lawfully disciplined and dismissed. No contributory fault occurs on this basis.
48. Secondly the Respondent asserts that the Claimant had taken confidential information from True North, which amounted to a breach of trust and confidence. The Claimant did so, because he wanted to ensure that, even if the company's LinkedIn account was frozen, he would still be able to engage with the work he was doing. I do not consider that this amounted to a breach of trust and confidence as asserted by the Respondent. If it did, it happened prior to the TUPE transfer and the Respondent had continued to employ the Claimant for some months after this. This indicates an acquiescence to any breach and an intention to continue the contractual relationship. Finally, I do not accept that the Respondent knew about this at the time of the resignation. Had Mr or Mrs Burden known of this, they would have raised it with the Claimant as soon as they could. They did not and therefore on balance, I find that they did not know of it and therefore it cannot be contributory factor to the Claimant's dismissal.
49. Thirdly, the Respondent asserts that the Claimant made comments which amounted to coercive control. I do not accept the Respondent's submission on this point. The relationship between the parties had broken down, the Claimant had been forced to resign due to the breach of contract by the

Respondent and they were engaged in litigation. The comments made do not amount to contributory fault as they occurred after the resignation.

50. Fourthly, the Respondent asserts that whilst still an employee the Claimant removed his user profile from two laptops. The Claimant was contractually obliged to return them at the end of his employment. His contract says that he must look after any property of the company. The laptops were not broken or unusable when they were returned, but due to the manner in which the Claimant removed his user profile, historical data could not be accessed. This put the Respondent to inconvenience and delayed their ability to continue the work which the Claimant had been doing. There was no specific term of the contract or instruction of the Respondent indicating what did or did not have to be left on the laptops when they were returned. The Claimant was therefore not in breach of contract as he returned the laptops and had taken care to ensure that he had looked after the Respondent's property. Whilst his actions led to difficulty and inconvenience for the Respondent, it was not an act which breached any specific term of the Claimant's contract, nor the implied term of trust and confidence.
51. *Polkey*
The Respondent asserts that the Claimant would have been dismissed for his failure to reveal his continuing association with The Search House and/or the emailing of confidential information. Given that the Respondent was not aware of this until after the resignation of either of these facts, this is a purely hypothetical exercise. The Respondent's evidence is based entirely on hindsight and the fact that they were already engaged in this litigation.
52. I do not believe that the emailing of the confidential information would have led to the Claimant's dismissal. No detriment had occurred to the company. The parties had continued to work together for some months beyond that time and Mr and Mrs Burden continued to rely on the Claimant to bring in work on behalf of the Respondent.
53. Had the relationship between the parties continued and the Claimant had been paid for his work by the Respondent, I do not believe that the Respondent would have uncovered the fact that the Claimant continued to be a director of The Search House, as there would be no reason to have alerted them. I therefore do not consider that this would have led to the dismissal of the Claimant in any event.
54. The issue of performance is a different matter. The Claimant was not working to his full capacity by the time he resigned. This was at least in part due to the fact that he was not being paid regularly and repeatedly having to remind and ask for his pension contributions to be paid. The Claimant said he was reluctant to enter into work when he was unsure whether the company were solvent. This may have been true for a period prior to the TUPE transfer, he had no reason to believe this to be the case once he was working for the Respondent.
55. I accept the Respondent's submission that the Claimant would have been placed on a performance programme had his performance continued on this path. However, I also find that if he had been placed on such a programme

and had been paid the money owed to him and his pension, the Claimant may have improved his performance and there would be a limited chance that it resulted in his imminent dismissal or resignation. I find that had such a programme occurred and the Claimant not been able to comply with it, any dismissal which did occur would not have been within 3 months. I therefore consider there was a 10% chance of his dismissal after 3 months. I award compensation for 3 months in full and for 3 months at 90%, in respect of the compensatory award

56. *Loss of Earnings*

The Claimant claims a loss from 29 May 2019 to 29 February 2020 (39 weeks 4 days). S.123(4) indicates that the employee must act reasonably to mitigate his loss. The Claimant set up his own business by re-establishing The Search House. The Respondent's argument that it was reasonable for the Claimant to seek work with others whilst also setting up on his own account is contradictory to their submission that they would not have employed the Claimant if he had been running his own business.

57. The burden of proof is on the Respondent to show that it was unreasonable of the Claimant to act in the way he did (or failed to do so). The Claimant has shown that he took steps within one week of his resignation to re-start his own business. It is unrealistic to expect a business to make sufficient profit to support a salary within a period of weeks. The Tribunal accepts the Claimant took reasonable steps to set up in business and that this took 8 months.

58. The Claimant's basic award is agreed as 9 weeks at £525 per week, the loss amounts to £4275.

59. The Claimant's loss of earnings does not commence until 29 August 2019 this amounts to 26 weeks to 28 February 2020. The parties agree that the net loss is £1,054,54 per week. The total compensatory loss is therefore (£13,709.02 + £12,338.11) a total of £26,047.13

60. *Pension contribution*

The parties agreed that the Claimant is owed £437.27 as the May 2019 contribution amount.

61. *Loss of Statutory Rights*

Whilst this is a matter for the discretion of the Tribunal, the sum represents an award to cover the time required to build up statutory rights in another employment. The appropriate award is £500.

62. *Holiday pay*

The parties agree that the Claimant's salary per day was £150.24. The Claimant had accrued nearly 11.25 days. In order to reflect the remaining days in May which were not worked, this will be rounded down to 11 days. In addition the Claimant had been allowed to roll over 3 days, hence a total allowance of 14 days. I accept that the Claimant had taken 7 days of holiday.

63. The 2 and 3 January 2019, when the Claimant was in hospital for a pre-arranged operation were sickness days and not holiday. There was no

evidence placed before me that he was not paid for these days. Claimant returned to work, albeit working from home on 4 January 2019. He was therefore entitled upon his termination to be paid for 7 days which he had accrued but not taken. This amounts to a total of £1051.68.

64. *Expenses*

The business expense claim was made on the software provided to the Claimant by the Respondent. This was an update of the paper form method outlined in the contract terms and does not negate the claim. The relevant policy indicates that claims between the Claimant's home and office are not recoverable. The mileage to and from the Claimant's home to Mr Burden's home was not recoverable as this was the Claimant's commute.

65. The other items listed on the software were supported by receipts or were mileage to meetings. In addition, receipts were shown to me which were for the purposes of entertaining clients. In total, the list of claims and receipts, without the commuting claims amounts to £366.68 and this is awarded to the Claimant.

66. *Life assurance/medical insurance/income protection*

The evidence showed that the Claimant did not enter into the Company medical insurance scheme and therefore has no loss. No evidence was provided to show that the Claimant had purchased any replacement income protection policy and therefore he has failed to prove any loss.

67. In relation to life assurance, this was a benefit which he received under a company policy, according to the contract of employment. The evidence provided by the Claimant shows that he has purchased a life assurance policy for himself after his resignation. This is a cost which results due to his resignation and amounts to a loss due to his unfair dismissal. The Claimant is entitled to recover £61.92 per month for the period of his past loss. $9 \times £61.92 = £557.28$

68. *ACAS uplift*

The meeting held between the Claimant and Mrs Burden discussed his grievance albeit that the meeting was not held in the most supportive or independent environment. I do not believe that an uplift is appropriate in this case.

69. *Grossing Up*

There is a requirement to 'gross up' the amount of the award which will be subject to tax. This is due to s. 401 ITEPA 2003. This applies to payments which are awarded net as a result of the termination of someone's employment. A tax free amount of £30,000 is deducted and the remainder is calculated to give the amount of tax which the Claimant will be required to pay. Employer national insurance contribution will also be paid on this amount by the Respondent.

70. The heads of damage which are included in this calculation are the compensatory amount of unfair dismissal (£26,047.13), damages for wrongful dismissal (£12,654.48), accrued holiday pay (£1051.68), unlawful deduction from wages (£8776.27). The award of pension lost or unpaid

should be included on the basis that this is not subject to tax.

71. The total award is £54,665.79 net. The non-taxable elements of the award are £6136.23. Thus the remainder of the tax free sum (£30,000-£6136.23) is £23,863.77. When applied to the whole of the taxable sum (£48,529.56-23,863.77) this allows £24,665.79 to require grossing up.
72. The tax rate applied is as follows; on the first £12,500 tax of 0%, on the next £37,500 tax of 20%, Thus £12,500 pays £0 in tax, the remaining £12,165.79 requires £2,433.16.
73. The recoupment provisions do not apply.
74. The total award is therefore £57,098.95.

Employment Judge Cowen

Date 21 June 21

JUDGMENT SENT TO THE PARTIES ON

22 June 21

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