



EMPLOYMENT TRIBUNALS

Claimant: P Scarratt

Respondent: Cogent Credit Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY (LONDON CENTRAL)

On: 7 October 2021

Employment Judge: Employment Judge Henderson (sitting alone)

Appearances

For the claimant: Ms C Evans (Counsel)

For the respondent: No attendance

JUDGMENT

1. The claimant's claim for wrongful dismissal succeeds. The claimant is owed 3 months' notice pay of £32,498.96 (being 13 x £2,499.42 gross weekly pay).
2. The claimant's claim for unpaid holiday pay succeeds. The claimant is owed four days holiday pay of £2,000 (being 4 x £500 gross daily pay).
3. The total award of gross pay is £34,498.96. The respondent must account to HMRC for income tax and National Insurance Contributions properly payable on this amount.
4. The respondent failed to provide a written statement of terms and conditions under s 1 of the Employment Rights Act 1996 and has succeeded in his claims. Accordingly, the Tribunal award the sum of £2,100 (being 4 weeks of pay at the statutory rate of £525).
5. The total monetary award is £36,598.96.

REASONS

Background

1. This was a claim for wrongful dismissal; unlawful deduction from wages in relation to holiday pay and a failure by the respondent to provide the claimant with written terms of employment contrary to s.1 of the Employment Rights Act 1996 (ERA). The claimant was employed by the respondent from 8 May 2019 to 17 April 2021 as chief sales officer; he was also a director of and shareholder in the respondent company.
2. The ET 1 was presented on 16 September 2019. The respondent denied the claims but lodged the response one month out of date. At a hearing on 22 June 2021 (which had been listed as a Final Hearing) EJ McKenna exercised her discretion to extend time to admit the response. The remainder of that hearing was used for the purposes of case management and the Final Hearing was listed for 6 and 7 October 2021 and detailed directions were given.

Hearing continuing in respondent's absence

3. Late on the evening of 5 October 2021, the respondent's director and representative, Julian Guppy sent an email to the Employment Tribunal office (which was not copied to the claimant or his representatives) stating that he was unable to attend the hearing for "personal family reasons". I asked the clerk for today's hearing to contact Mr Guppy and he explained in a telephone conversation (on 6 October) that he was travelling in order to arrange alternative care for his elderly mother. He was made aware that the hearing may proceed in his absence, as allowed under rule 47 of the Employment Tribunal Procedure Rules 2013 (as amended) (The Tribunal Rules). Mr Guppy acknowledged that this may be the case. There was no formal application for a postponement of the hearing.
4. At the commencement of the hearing I asked Ms Evans to make any submissions with regards to a possible postponement of the hearing. She explained that whilst the claimant was sympathetic to the reasons given by Mr Guppy, the Tribunal had to take into account the fact that the claim had been lodged over 2 years ago; that this would be the third time a final hearing in this matter had been postponed. EJ McKenna had clarified the issues and given clear directions for the current Final Hearing and it could not be in the interests of justice or in accordance with the Overriding Objective (rule 2 of the Tribunal Rules) for a further postponement.
5. Bearing in mind the Overriding Objective and the sequence of postponements in the current case and also bearing in mind that cases should be dealt with in ways which are proportionate to their complexity and avoiding delay and expense, I decided to proceed with hearing this case in the respondent's absence.

The Issues

6. The issues for determination by the Tribunal were as follows:

- was the claimant wrongfully dismissed? The claimant said that he was entitled to 3 months' notice which had been orally agreed between him and the respondent. The respondent said that there was a written agreement (unsigned by the claimant) dated 19 October 2018, which provided for 30 days' notice. Although not raised in the ET 3 response or at the Case Management hearing in June 2021, the respondent alleged in Mr Guppy's witness statement dated 3 August 2021, that the respondent was in any event entitled to summarily dismiss the claimant as a result of various acts of gross misconduct. This was denied by the claimant;
- the claimant claimed that he was also entitled to 6 days' accrued but untaken annual leave. The respondent accepted that as at the date of termination of employment, the claimant had accrued 9 days holiday, but said that he had taken all of that holiday.
- Whether the respondent had issued the claimant with a written statement of terms and conditions under s.1 ERA?

Conduct of the Hearing

7. The Tribunal was presented with an agreed bundle of documents totalling 120 pages (page references in these reasons are to that bundle). The Tribunal was also presented with two written witness statements from the claimant dated 11 June 2021 and 17 August 2021 and a written witness statement from Mr Guppy dated 3 August 2021. The claimant adopted his witness statements as his evidence in chief.
8. I explained to the claimant (which was acknowledged by Ms Evans) that in Mr Guppy's absence, the Tribunal would wish to ensure that the key points raised by the respondent in their defence should be put to the claimant when hearing his oral evidence. In fact, most of these points were very helpfully put by Ms Evans herself as part of her supplemental questions to the claimant. Any remaining issues were dealt with by me in Tribunal Questions.

Findings of Fact

9. The claimant explained the nature of the respondent's business which was developing and selling software to wholesale food and drink companies which would enable them to sell to their clients, minimising paperwork and processes from 2 weeks to several hours. The claimant explained that references in the documentation and evidence to "the pipeline" was to the communication by the respondent (primarily through the claimant) with their customer businesses, selling the respondent's services to them.
10. The claimant explained that he had been involved with the respondent company from its foundation on 8 May 2018. He referred to emails at pages 76-77 which set out the terms agreed between the directors (the claimant, Mr Guppy and

Edward Cahill) and the respondent's major investor, Paul Birch. The emails indicate a grant of 10 million shares, with the intention that the claimant would hold 32.88% of those shares; thereby giving him a significant influence in the running of the respondent company.

The Employment Agreement/Notice Period

11. The claimant said that around that time there were discussions with regard to the employment terms for himself and Mr Guppy. They looked at their contractual arrangements with previous employers and it was agreed that there would be a "levelling up" so that each would have the most preferential terms. On that basis, the claimant said that the notice period for both him and Mr Guppy was 3 months which was reasonable given their senior status within the company.
12. The claimant was referred to pages 58-66 which Mr Guppy said was an employment agreement dated 19 October 2018, which had been sent to the claimant but which he had not signed. The claimant said that he had never seen this agreement until after he had issued proceedings in the Employment Tribunal. He denied that this agreement set out the terms which had been agreed between him and the respondent when he commenced his employment.
13. The claimant noted that at paragraph 3 of his witness statement, Mr Guppy said that all legal documentation of the business was done using the SeedLegals software package. The claimant accepted that this was correct. However, the claimant also explained, using various screenshots of the Seed Legal software as to how documents and individual profiles were created; how documents were sent to individuals for signature and how E-signatures could be used and recorded (pages 91- 92 X). The claimant noted that the respondent had not provided any evidence to show that the alleged employment contract had been sent to him for signature in October 2018.
14. I note that the lack of such evidence from the respondent is a breach by the respondent of the disclosure directions contained in the Case Management Order of June 2021, which specifically provided for the disclosure of such information.
15. Mr Guppy was not present to give oral evidence or to challenge the evidence of the claimant. However, on the basis of the evidence put to the Tribunal, I find that the employment agreement contained in the trial bundle is not, on a balance of probabilities, the relevant employment agreement for the claimant. I therefore find that the respondent has not provided the claimant with a section 1 written statement as required in the ERA.
16. I also find based on the oral evidence of the claimant, which again was not challenged at the hearing, that the claimant was entitled to 3 months' notice of termination of his employment. The respondent did not produce a copy of Mr Guppy's contract of employment as a comparison with the terms alleged for the claimant. I accept the claimant's evidence that this would be a reasonable notice period for a director and senior employee of a start-up company.

Justifiable Summary Dismissal?

17. The respondent's allegations with regard to why it was justified in dismissing the claimant without notice were set out in Mr Guppy's witness statement (paragraph references below are to that witness statement). Mr Guppy was not present to cross-examine the claimant. However, Ms Evans did put each of Mr Guppy's allegations to the claimant and I heard his oral evidence in response.
18. Paragraph 5 - Mr Guppy said that Mr Birch had become extremely concerned in early 2019 that there was "little sales traction and little evidence that the sales process was being run as he expected it to be". The claimant accepted that there had been a disagreement between him and Mr Birch with regard to how the pipeline was working. He also accepted that he may have had heated discussions with Mr Birch, become angry and raised his voice, however, he denied that he had ever been physically violent or threatened violence as alleged by Mr Guppy in paragraph 10.
19. Paragraph 6-Mr Birch informed other directors in March 2019 that he was no longer willing to put equity into the business and finance the claimant's salary, whom he regarded as a freeloader. Mr Guppy said that it was then decided by the other directors that the claimant should be removed from the business as quickly as possible, with little opportunity for confrontation.
20. The claimant said that due to their professional disagreements, Mr Birch had decided that the claimant should be removed from the business and that his influential shareholding should be reduced to 5%. The claimant referred to emails from Mr Birch at pages 86-89. In these emails Mr Birch makes it clear that he would not continue to invest in the respondent unless the claimant reduces his shareholding to 5% thereby, in Mr Birch's words, giving the business a chance of survival. If the claimant refused to reduce his shareholding then there would be no further investment from Mr Birch and the claimant would "own a slice of nothing".
21. The claimant said that around this time Mr Cahill had given up his other permanent employment and would therefore be seeking a salary from the respondent. The respondent could not afford both the claimant and Mr Cahill's salary hence the decision to dismiss the claimant.
22. The emails are dated from 18 to late April 2019: the email dismissing the claimant with immediate effect is dated 18 April 2019. I note that this email at page 85 gives no reason for the summary dismissal and makes no mention of any of the allegations raised by Mr Guppy in his witness statement and does not mention gross misconduct even in a generic sense.
23. Paragraph 7-Mr Guppy says that the claimant was dismissed after further investigation revealed a lack of activity in Hubspot. The claimant explained that this was a customer relations management tool where all prospective customers and their details could be entered and this could then be linked to an email account which could then track all sent emails. This was a method which

allowed transparency to track activity in working with customers. The claimant, Mr Cahill and Mr Birch all had full access to it.

24. The claimant was referred to Mr Guppy's statement that he had deleted his Hubspot account when he was dismissed. The claimant said that he had deleted his own user profile but not the respondent's account. The respondent still had access to that account and could have produced documents to support the allegations of his lack of activity, which the claimant denied.
25. The claimant also noted that the respondent had never raised any issue of his performance with him at the relevant time. The Tribunal notes that the respondent has not presented any documentary evidence in the trial bundle which suggests that (other than the accepted dispute with Mr Birch with regard to the pipeline) there was any contemporaneous suggestion that the claimant's performance was not meeting the relevant standards.
26. Paragraph 8-Mr Guppy said that the respondent discovered that the claimant was a director of Soho Street Cocktails (SSC), a registered company, and they realised that he had been "moonlighting" and not devoting his full professional attention to the respondent. The claimant said that he had been involved with SSC before the founding of the respondent. He said that all directors and employees of the respondent were aware of this and there had been a meeting/presentation the respondent's offices in or around August/September 2018 by SSC at which Mr Guppy had been present. Mr Birch had considered investing in SSC. The claimant said that his own involvement with SSC was not in bad faith but had been fully disclosed to the respondent. He further said that there had never been any complaint or concern about SSC expressed to the claimant during his employment; the first complaint he had been aware of was in Mr Guppy's witness statement of 3 August 2021.
27. Based on the evidence presented to the Tribunal, I find that the respondent has not shown on a balance of probabilities that there was any conduct or gross misconduct by the claimant which would justify his summary dismissal.

Holiday Pay

28. Both parties agree that the claimant was entitled to 9 days' holiday as at the date of the termination of his employment.
29. In his witness statement, Mr Guppy said that the claimant had taken his full entitlement. He said that all employees took the early days of January as holiday (Mr Guppy does not specify any dates). He further said that the claimant took a "long trip" to the US, which used up his holiday entitlement.
30. The claimant accepted that the respondent's office was closed for 3 days around 2, 3 and 4 January. However, he said that his role was not solely office-based and that he was working from home during that period testing out the software platform. He referred to emails at pages 78-80 which showed this as at 4 January.
31. The claimant said that there had never been any communication with employees which said that they had to take their annual leave around those 3

days in January. The Tribunal was not presented with any evidence from the respondent to show that employees had been given notice under the Working Time Regulations 1998 that they were required to take part of their annual leave during that period.

32. The Tribunal finds that the claimant was not on annual leave in early January.

33. As regards the “long trip” to the US, the claimant produced documentary evidence of his flight itinerary to and from Los Angeles (pages 82-83). The claimant left London at 12:50 on 1 March 2019 and returned at 12:25 on 7 March 2019. This cannot realistically be described as a “long trip”. 1 March was a Friday which meant that the only working days in the period away, were 1, 4, 5, 6 and 7 March namely 5 days.

34. The claimant said that he worked on both 1 and 7 March. He said that he returned to the office on 7 March sometime between 3-4 PM and stayed there for 3-4 hours, although he accepted that he had not worked late that evening when he returned home. He said that he had also worked on 1 March, however, given that his flight was at 12:50 and given the likely check-in time, he would have not had much time in the office on that day.

35. I accept the claimant’s evidence that his role was such that he worked long hours not only in the office and was frequently working from home, effectively in his own time. However, I do not accept that he was working on 1 and 7 March 2019. I refer to page 81, the claimant’s work calendar, which shows 1-7 March inclusive blanked out under the heading “California”.

36. I find that the claimant took 5 days of his annual leave during that period and is therefore, owed four outstanding days, and not six as he alleges.

Conclusions

Wrongful Dismissal

37. The claimant was entitled to 3 months’ notice to terminate his contract. He was not given such notice. I have found that the respondent was not justified in summarily dismissing the claimant. Therefore, the claimant was wrongfully dismissed and is owed 3 months’ pay of £32,498.96 (being 13 x £2,499.42 gross weekly pay).

Holiday Pay

38. I have found that the claimant is owed four days holiday pay at £500 per day gross. This totals £2000.

39. The total award of £34,498.96 is made gross and the respondent must account to HMRC for any income tax and National Insurance Contributions properly deductible from that award.

Failure to provide s1 Written Statement of Terms and Conditions

40. I have found that no such statement was provided by the respondent. Accordingly the claimant is entitled to an award under s38 Employment Act 2002 of between 2 to 4 weeks' pay capped at the statutory rate of £525.
41. I asked Ms Evans why this award should be at the higher maximum rate. She said that this had been a cynical attempt by the respondent to avoid giving a written statement of terms and conditions. Mr Guppy had indicated that other employees were given employment agreements and no reason had been provided for the claimant's omission. This was an organisation which knew its obligations, but had failed to comply with them.
42. I exercise my discretion to award 4 weeks' pay at £525 per week, totalling £2100.
43. The total monetary award is £36,598.96.

Employment Judge Henderson

JUDGMENT SIGNED ON: 7 October 2021

JUDGMENT SENT TO THE PARTIES ON
07/10/2021

FOR THE SECRETARY OF THE TRIBUNALS