



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Anthony Falkner

**Respondent:** Shred Station Limited

**Heard at:** Bristol Employment Tribunal (by video-CVP)

**On:** 18 June 2021

**Before:** Employment Judge Millard

## **Representation**

Claimant: Ms Nichols, counsel

Respondent: Mr Isaacs, counsel

**JUDGMENT** having been reserved on 18 June 2021, the following reasons are provided:

## REASONS

### **Introduction**

1. These written reasons should be read in conjunction with the reserved judgment of 25 June 2021.
2. I would like to apologise to the parties for the delay in providing them with these written reasons.

### **Hearing**

3. The hearing was conducted via the CVP video platform on Friday 18 June 2021 with all parties appearing by CVP video.
4. The Claimant gave evidence. The Respondent called the following witnesses, Lucy Pakes and Simon Franklin.
5. I had sight of an agreed bundle of documents totalling 83 pages which was produced by the Respondent.

### **Claim**

6. As per the Claimant's claim form, his claim was for,

- Breach of contract for the sum of £15,901.74, plus interest
7. The Claimant's claim for constructive dismissal was dismissed on withdrawal by the Claimant on 11 May 2021.

### **List of Issues**

8. The agreed list of issues in this case are as follows,
- a. Did the Claimant's conduct during the agreed garden leave period amount to a repudiatory breach of clause 9, 16 or 18 and/or the implied term of trust and confidence of the claimant's contract of employment, in particular:
    - i. The LinkedIn post confirming his redundancy which was subsequently removed?
    - ii. The messages sent to clients of the respondent through his LinkedIn profile?
    - iii. The respondent alleges that the Claimant committed a repudiatory breach of clause 18 of his contract of employment and/or the implied term of mutual trust and confidence by reasoning in his solicitor's open correspondence letter dated 1 April 2020 and sent at 17:08 on 2 April 2020 that he "no longer considered himself employed" by the respondent and therefore not bound by the obligations in the contract. The Claimant strongly denies those words pleaded by the Respondent were used in the letter from his solicitors dated 1 April 2020 at all.
  - b. If the tribunal concludes that the conduct as set out above at paragraph 'a' occurred, then did it amount to a repudiatory breach of contract (which is denied), did the Respondent terminate the claimant's contract on 6 April 2020 because it accepted the Claimant's alleged breach(es) of the contract?
  - c. Did the Respondent's conduct in accessing the Claimant's private correspondence through his LinkedIn account amount to a breach of the Claimant's contract of employment? If so, what relevance does this have to the claim?
  - d. Was the Claimant entitled to be paid his notice period in accordance with his contract of employment? If so, it is agreed that the balance of the Claimant's notice pay was £15,901.74. Was the claimant under a duty to mitigate his loss? Has the Respondent evidenced a failure to mitigate that loss?
  - e. Is the Claimant entitled to claim interest at 8% above the current Bank of England base rate and if so on what basis?

### **Findings of Fact**

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9. The Respondent is a business which is a provider of secure shredding services for confidential waste. The Claimant was employed by the Respondent as a Sales Director and commenced employment on the 15 October 2018.
10. The intention was for the Claimant to create a national telesales team based in Gloucestershire.
11. In around February 2020 the Respondent made the decision to shut the Gloucester office and make the employees who were based there, including the Claimant, redundant.
12. On 25 February 2020, Mr Franklin the Managing Director of the Respondent attended the Gloucester office and informed the Claimant that they were closing the Gloucester office and terminating his employment on notice in accordance with his contract. This was confirmed in writing to the Claimant in a letter dated 25 February 2020. The termination letter provided for 4 months' notice, for which the Claimant was to be paid his nominal salary. The effective date of termination was 24 June 2020. The Claimant was placed on garden leave and not required to do any work in his notice period.
13. Later that same day, the Claimant posted on his LinkedIn profile that,  
  

*'For the first time in my career I have been made redundant today, which is a new experience for me. So I am now looking for a new opportunity. I would appreciate any of my connections here on LinkedIn letting me know of anything suitable. Thank you.'*
14. Mr Franklin sent the Claimant a text message requesting he remove the post as he was on garden leave and still employed by the Respondent under the Contract of Employment. The Claimant deleted the post and sent a text message back to Mr Faulkner stating, *'I need to find a job Simon! People I know have been out of work for months. I have deleted it but I need to find a job and LinkedIn is one way to do this.'*
15. The Claimant returned his smartphone and laptop computer to the Respondent. When accessing the smartphone, the Respondent discovered that the Claimant's LinkedIn account was still linked to the smartphone and as a result the Respondent became aware of several messages sent on LinkedIn both from and to the Claimant. These messages are contained at pages 37-42 of the agreed bundle and relate to the Claimant being made redundant. The contact is with four individuals. Two of these individuals were involved in the industry and the Claimant had known them for a long period of time and were personal friends. The third person was employed by a competitor to the Respondent. The Fourth worked as a Recruitment Consultant. In one message with the Recruitment Consultant, the Claimant states that his team had produced sales of £800K in 2019 with his telesales team doing £300K and the field sales team doing £320K.
16. The Respondent carried out an investigation and thereafter wrote a letter before action to the Claimant of 23 March 2020 (pages 59-67 of the agreed bundle,) seeking undertakings from him.

17. The Claimant's solicitors responded by way of a letter dated 1 April 2020 (pages 69-72 of the agreed bundle) which was sent on 2 April. The letter addressed issues raised by the Respondent in their letter of 23 March 2020. The letter stated that the Claimant had been wrongfully dismissed and alleged that the Respondent was in breach of contract. The letter states that the Claimant is 'happy to provide undertakings in relation to confidentiality only.' At no point in the letter does the author write that the Claimant, "no longer considered himself employed."
18. On the 6 April 2020 the Respondent determined that the Claimant's solicitor's correspondence of 2 April 2020 amounted to a repudiatory breach of the contract of employment and terminated the contract.

### Contract of Employment

19. Clause 9 of the Employment Contract relates to confidential information and states that,

*9.1 The employee acknowledges that in the course of the Employment they will have access to Confidential Information. The Employee has therefore agreed to accept the restrictions in this clause.*

**9.2 The Employee shall not (except in the proper course of his duties), either during the Employment or at any time after Termination, use or disclose to any person, company or other organisation whatsoever (and shall use his best endeavours to prevent the publication or disclosure of) any Confidential Information...**

[Emphasis added]

20. Clause 16 relates to termination and states,

*16.2 The Employer may terminate the Employment with immediate effect and without notice or liability to make any further to the Employee (other than in respect of amounts accrued due at the date of termination) if the Employee is guilty of any gross misconduct or commits a serious breach of duty under this agreement.*

*16.3 The rights of the Employer are without prejudice to any other rights that it might have at law to terminate the Employment or to accept any breach of this agreement by the Employee as having brought the agreement to an end. Any delay by the Employer in exercising its rights to terminate shall not constitute a waiver thereof.*

*16.4 On termination of the Employment, or, if earlier, at the start of a period of garden leave the Employee shall:*

- (i) *Immediately deliver to the Employer all documents, books, materials, records, correspondence, papers and information (on whatever media and wherever located) relating to the business or affairs of the Employer or any Group Company or its business contacts, any keys and any other property of the*

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*Employer or any Group Company including any vehicle provided to the Employee, which is in his possession of under his control.*

- (ii) *Irretrievably delete any information relating to the business of the Employer or any Group Company stored on any magnetic disk or memory and all matter derived from such sources which is in their possession or under his control outside the Employer's premises; and*
- (iii) *Provide a signed statement that they have complied fully with their obligations under this clause together with such reasonable evidence of compliance as the Employer may request.*

21. Clause 18 relates to Garden Leave and states,

*18.1 Following service of notice to terminate the Employment by either party, or if the Employee purports to terminate the Employment in breach of contract, the Employer may by written notice place the Employee on garden leave for the whole part of the remainder of the Employment.*

*18.2 During any period of garden leave:*

*18.2.1 The employer shall be under no obligation to provide any work to the Employee and may revoke any powers the Employee holds on behalf of the Employer or any Group Company;*

*18.2.2 The Employer may require the Employee to carry out alternative duties or to only perform such specific duties as are expressly assigned to the Employee, at such location (including the Employee's house) as the Employer may decide;*

*18.2.3 The Employee shall continue to receive their basic salary and all contractual benefits in the usual way and subject to the terms of any benefit arrangement;*

***18.2.4 The Employee shall remain an employee of the Employer and bound by the terms of this agreement (including any implied duties of good faith and fidelity);***

*18.2.5 The Employer may exclude the Employee from any premises of the Employer or any Group Company; and*

***18.2.6 The Employer may require the Employee not to contact or deal with (or attempt to contact or deal with) any officer, employee, consultant, client, customer, supplier, agent, distributor, shareholder, advisor or other business contact of the Employer or any Group Company.***

[Emphasis added]

22. Whilst a breach of contract entitles an innocent party to pursue a claim for damages, it does not always entitle a party to terminate the contract.
23. The right to terminate arises upon a sufficiently serious breach which amounts to a repudiation of the whole contract. This is one which goes to the root of the contract and includes situations where the words or conduct of a party indicate that they do not intend to honour future obligations under the contract.
24. In assessing whether there has been a fundamental breach of the implied term of mutual trust and confidence, the case of *Malik v BCCI [1997] IRLR 462*, HL states at para 14 that, *“the conduct must...impinge on the relationship in the sense that, looked at objectively it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances.”*
25. Any breach of the implied term of mutual trust and confidence will be regarded as repudiating the contract of employment (*Woods v WM Car Services (Peterborough) Limited 1981 ICR 666*).

#### **Findings on the List of Issues**

26. I do not find that the Claimant's conduct during the agreed garden leave period amounted to a repudiatory breach of clause 9, 16 or 18 nor the implied term of trust and confidence of the Claimant's Contract of Employment.
27. Having been placed on garden leave for his notice period, the Claimant faced the prospect of having no employment or income from the 24 June 2020, a period that also corresponded with the height of the Coronavirus pandemic. The Claimant was entitled to search for new employment and there is no restriction on him doing so.
28. LinkedIn is a well-known business and employment platform used for professional networking. Using LinkedIn, individuals build up a network of contacts through which they can build a profile and market business opportunities within their industry. By its nature and specifically built into the LinkedIn platform are opportunities for employers to post their job vacancies and for individuals to seek those opportunities.
29. There is nothing within the Claimant's contract of employment that restricts his ability to seek further employment, nor would it be appropriate for such a restriction to be in place. The Claimant's LinkedIn post of 25 February, was nothing further than him informing his professional network that he had been made redundant and was seeking further employment. Any employer considering such employment would naturally enquire as to the reason why he was seeking new employment and there would be no reason for him not to disclose that his current employment was coming to an end as a result of redundancy. There is nothing confidential in the Claimant stating that he was looking for new employment as a result of redundancy. This public post on the LinkedIn platform did not reference that the Gloucester office

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was being closed - information that would itself shortly be in the public domain and by the end of his garden leave.

30. The conversation with the recruitment consultant was a private conversation and not public. In seeking new employment within a sales industry, it would again be normal for the Claimant to provide information on previous sales performance. The information is general in nature, providing a broad figure as to previous sales obtained and relates to the performance of the Claimant as a sales manager. Further, this information was provided within a private conversation within the LinkedIn platform, solely with the aim of the Claimant obtaining further employment. It relates to his recent performance in sales. In my view, there is no breach of clause 9.2 of the Contract of Employment.
31. With regards to the contact with the three other identified individuals. two of these individuals were personal friends and the third worked for a competitor. As is often the case in modern business, individuals who work together or alongside each other over several years, can become friends as well as also working for competitors or clients. There is nothing within clause 18.2.6 that prohibited the Claimant from contacting personal friends or competitors of the Respondent. Further, this communication and contact only came about as a result of the Claimant's attempts to secure new employment as a result of his post of 25 February 2020. The Respondent points out that the Claimant has a duty to mitigate his losses. How is he to do this, other than by seeking new employment. In view of the specialist field that both parties work in, the most obvious course is for the Claimant to speak to his professional contacts. It cannot be right that the Claimant should wait until the end of the garden leave period and the loss of his income, before being able to seek further employment. In my view there is no breach of clauses 9.2 or 18.2.4 and 18.2.6 of the Contract of Employment.
32. It is quite clear that by the time of the Claimant's solicitor's letter dated 1 April 2020, there had been a deterioration in the relationship between the Claimant and the Respondent. However, this letter arises in response to the claims put forward by the Respondent against the Claimant, which were denied by the Claimant. Neither it nor the Claimant's conduct as a whole give rise to a repudiatory breach of clause 18 nor the implied term of trust and confidence, such that the Respondent can escape his liability to pay the remaining notice pay of the Claimant under the Contract of Employment.
33. With regard to the Claimant's duty to mitigate his losses. The Respondent has not evidenced a failure to mitigate that loss. The Claimant had less than four months in which to secure further employment within a specialist area and at a time of the Covid-19 pandemic which gave rise to national lockdowns.
34. For the reasons set out above I do not find that the Claimant's conduct amounted to a repudiatory breach of the contract and the Respondent was not entitled to terminate the contract. Accordingly, the Claimant was entitled to be paid his notice pay in accordance with his Employment Contract in the sum of £15,901.74

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35. In view of my findings as set out above I do not need to decide the issue of the access to the IT equipment and in any event, it is not clear what remedy any finding with regard to this would lead to.
36. There are two different situations in which interest is available on a tribunal award. First, where a tribunal award has not been paid interest accrues on the unpaid sum. Secondly, a tribunal can award interest in discrimination claims brought under the Employment Act 2010 as part of its award of compensation, to compensate for the fact that compensation has been awarded after the loss compensated for has been suffered.
37. Accordingly, there is no power to award interest in the present case.

**Conclusions**

38. The respondent was in breach of contract for failing to pay the claimant's notice pay in accordance with his contract of employment.
39. The respondent is ordered to pay to the claimant the sum of £15,901.74, being damages for the breach of contract.

Employment Judge Millard  
Date: 27 September 2021

Reasons sent to the parties: 20 October 2021

FOR THE TRIBUNAL OFFICE