Case Number 1300548/2021
Type V

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Ms F Tsang		**HRS Family Law Solicitors Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 6 September 2021

EMPLOYMENT JUDGE GASKELL

Representation
For the Claimant: **In Person**
For the Respondent: **Mr C Rebbeck (Managing Director)**

JUDGMENT

The Judgement of the tribunal is that:

The claimant was wrongfully dismissed by the respondent in breach of her employment contract there is an award of damages to the claimant payable by the respondent in the sum of **£6075** (net) calculated as follows:

Unpaid notice pay	£4048 (net)
Loss of holiday pay	£ 625 (net)
Loss of pension contributions	£ 187 (net)
Uplift pursuant to Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 @ 25%	£1215
Total Award	**£6075**

Note: The sums awarded above have been calculated net of income tax and national insurance contributions on the basis that upon payment thereof the respondent will make an appropriate and corresponding payment to HMRC.

REASONS

The reasons for the judgement set out above were given orally at the conclusion of the hearing these written reasons are provided pursuant to a request from the claimant made at the time.

Introduction

1 The claimant in this case is Ms Fiona Tsang, a solicitor with 11 years post-qualification experience. The respondent is a firm of family law specialists with nine offices across the West Midlands. The managing director is Mr Clive Rebbeck who appeared before me in that capacity rather than as a professional advocate. The claimant commenced employment with the respondent as a solicitor on 23 March 2020 and was dismissed from that employment on 12 October 2020. She was dismissed summarily without notice: respondent's case is that the claimant was dismissed for gross misconduct and that accordingly she was not entitled to be paid notice.

2 On 15 February 2021, the claimant presented her ET1 in which she claims two month's salary in lieu of notice together with the additional holiday entitlement which would have accrued during her notice period; employers pension contributions which would have been paid during the notice period; this holiday pay which she claims was accrued before her dismissal; bonus which she says would have been paid during her notice period; and unpaid pension contributions which she says were unpaid prior to her dismissal.

3 The respondent's case is that holiday and pension up to the date of dismissal were fully paid. The respondent accepts that if the circumstances of the claimant's dismissal was such that she was entitled notice and she would be entitled to her salary for the notice period together with holiday pay and pension contributions subject to her obligation to mitigate her losses. So far as the bonus is concerned, the respondent's case is that the payment of bonus is entirely discretionary and that it would not have been paid to an employee who was working her notice. The respondent says likewise with regard to 5 days of potential accrued holiday pay.

The Evidence

4 I heard evidence from two witnesses: the claimant giving evidence on her own account; and Mr Rebbeck on behalf of the respondent. I found both witnesses to be truthful witnesses and indeed there is no real dispute as to the facts of the case. There was however an unpleasant exchange where Mr Rebbeck believed that he was being accused of lying - and he in turn then accused the claimant of lying. My judgement is that this really was an

overstatement on both counts on an issue which had no great relevance to what I have to decide. The respondent had included in the bundle a composite document of emails passing between the claimant and Mr Rebbeck on 12 October 2020: the respondent's case is that the text of the emails have been faithfully reproduced by copying and pasting from the original documents; the claimant does not accept this to be the case and asked the respondent to produce the original emails, but this did not happen. Mr Rebbeck interpreted the claimant's questions as an accusation to him of forging emails and he responded as I say by accusing the claimant of lies. It seems to me that the most we can say is that the claimant has a different recollection of the content of those emails than those which appear in the bundle; and frankly, Mr Rebbeck has given no coherent explanation for why he chooses to make a composite document rather than simply include the original emails. But, the reason I say that this is an overstatement on both sides is that there is no dispute as to the thrust, intent and content of the emails taken as a whole.

The Law

5 So far as the law is concerned, this is a claim for wrongful dismissal - a breach of contract case pure and simple. Notice of dismissal was not given as provided for in the claimant's contract of employment. Neither was she paid any salary in lieu of the notice period. If by her conduct the claimant had acted in fundamental breach of the contract and in dismissing the claimant the respondent had effectively accepted the breach, the claimant would have no right to a notice period or any payment in lieu thereof. The respondent case is that this exactly what happened here.

6 Where a wrongful dismissal case differs very significantly from an unfair dismissal case is that an unfair dismissal case is judged on the facts as the respondent genuinely and reasonably perceived them to be. In a wrongful dismissal claim, it is for the tribunal objectively judge whether claimant was in fact in repudiatory breach of contract. The breach does not necessarily have to be the reason for the dismissal. During the hearing I referred the parties to many of the well-known cases decided in the higher courts relating to wrongful dismissal.

7 I also considered a case with which I was unfamiliar to which Mr Rebbeck referred me: ***Adesokam -v- Sainsbury's Supermarkets Limited*** **[2017] EWCA Civ 22 (CA)**. The point made in that case appears to have been that and the claimant had been dismissed for gross misconduct because of a failure to implement a policy; but it appeared to be accepted that he had failed because of neglect rather than deliberate omission on his part. The case that he took to the Court of Appeal was whether it could properly be described as serious misconduct if somebody omitted to do something by neglect rather than deliberately. The Court of Appeal held that that could be serious misconduct and

did not interfere with the trial judge's finding that it was a lawful summary dismissal.

The Facts

8 The facts of this case are fairly straightforward. The claimant commenced employment in March 2020 at the respondent's Dudley office. She had deliberately restricted her application for employment to the Dudley office for her own personal reasons There is no nothing to indicate that the respondent would be aware of those reasons. It is clear from the documentation that the respondent had the contractual right to require the claimant to work out of a different office - and that it need not give notice or any particular amount of notice of such a change.

9 On 9 October 2020, the claimant received a telephone call at around 12 noon from Mr Rebbeck advising her that she was to move to the Walsall office with effect from Monday 12 October 2020 (the next working day). There was a second telephone conversation at around 5pm in which the claimant made clear that, for a variety of reasons, she was uncomfortable with having to move office. She mentioned her school run: whilst it may be the case that her home address is nearer to Walsall or at least no further away than Dudley; her case is that the journey from her child's school to Walsall was much more problematic than the journey from school to Dudley.

10 At 5:45pm on 9 October 2020, Mr Rebbeck emailed the claimant telling her that she was required to attend Walsall on the Monday morning. I accept the claimant's evidence that she didn't see that email until Monday morning. But she well knew that Mr Rebbeck was expecting or requiring her to attend Walsall.

11 The claimant did not go to the Walsall office on the Monday morning. She went to the Dudley office where she continued with her existing workload. There was clearly work for her to do at Dudley, and she got on with it. Indeed, the claimant dealt with urgent telephone hearing first thing on the Monday morning. During the course of the morning, Mr Rebbeck sent messages for the claimant to telephone him. The claimant did not telephone Mr Rebbeck, but she did explain by email that she had been very upset by the telephone conversation at 5pm on the Friday and for that reason she hoped that they could continue the dialogue by email rather than by telephone conversation.

12 For the first time the claimant raised what for her might have been a more important reason why sending her to Walsall might not be appropriate. She felt that she lacked the experience to effectively supervise the Walsall office - which is what she was being asked to do. Whilst clearly, the directors of business have the right to run the business as they see fit; the claimant, as a qualified solicitor,

has a professional obligation to ensure that she is properly experienced to undertake work allocated to her. When the claimant stated that she didn't feel she was the right person Walsall; and when she stated that she didn't wish to continue the discussion by telephone - but was willing to continue it by email, the response was for the respondent's practice manager to go to the Dudley office and dismiss the claimant. The claimant's evidence is that she was told that she was dismissed because Mr Rebbeck did not like her emails. The first mention of dismissal for gross misconduct came several days later when the claimant attempted to agree what her final salary payment would be. It matters not what the respondent said at the time; and it doesn't matter what the actual reason for the dismissal was. The issue in this case is whether I am satisfied that by her conduct prior to dismissal the claimant had acted in fundamental breach of employment contract.

The Claimant's Case

13 The claimant accepts that the respondent had the contractual right to move her to Walsall. Her case is that she asked for more time to consider the position and her case is that it was not serious misconduct for her simply to fail to move immediately without further discussion or without proper warning and indeed without a disciplinary meeting.

The Respondent's Case

14 The respondent's case is that the claimant had failed to accept a lawful instruction from the managing director; and that if employees chose not to accept such instructions it would be impossible for him and his co-directors to run the practice efficiently and within SRA guidelines. Accordingly, the claimant's conduct amounted to a fundamental breach of the employment contract and she could properly be summarily dismissed.

Discussion & Conclusions

15 My conclusions are that is a clear contractual right on the respondent to require an employee to move to another office. However, in my judgement, it must be implied that the respondent would act after proper consultation and proper consideration of an employee's concerns before enforcing that contract. With regard to the refusal to speak to Mr Rebbeck, this was not an outright refusal to speak because it was accompanied by an explanation from the claimant that she had been upset by the telephone conversation at 5pm on Friday. She was willing to continue the engagement but by email.

16 In my judgement, it must be implied into the contract that, faced with the claimant's concerns, the respondent would hold a meeting at which the claimant

could have been supported by a colleague or trade union representative; at which Mr Rebbeck might be accompanied by someone in whom the claimant had confidence; so that the claimant's concerns could be properly considered. And the claimant could better understand what was being asked of her and why.

17 No such meeting was offered; no such meeting took place. The claimant was simply dismissed. The question I have to answer is whether the claimant was acting in fundamental breach of the employment contract? Was she demonstrating no intention to be bound by the employment contract in the future? In my judgement, the claimant's actions clearly did not amount to a fundamental breach or such an intention. Indeed, that morning she had attended Dudley office and got on with her work. The claimant had explained her concerns; she offered to continue the engagement with Mr Rebbeck by email.

18 The overwhelming requirement is for Mr Rebbeck to go to Dudley office; either him or somebody with his authority; and meet the claimant in a calm environment and discuss the issues. If that had been done, and a considered decision then taken that the claimant was nevertheless required at Walsall, then refusal might properly have amounted to an indication of a refusal to be bound by the contract. But that, in my judgement, was not the case as of Monday 12 October 2020. Accordingly, if the respondent decided to dismiss the claimant on that day, it needed to dismiss her with her full contractual notice.

19 The respondent has raised the issue of mitigation of loss: asking the claimant what efforts she made to obtain work after the dismissal? The claimant's evidence was rather vague: she said that she had applied to a number of firms without success. I remind myself that if a respondent is alleging a failure to mitigate, the burden of proof is on the respondent to establish that. The respondent has not produced any evidence of available vacancies which the claimant neglected to apply for, and ,in my judgement, if we were considering mitigation through to today's date it would be a different story; but it would not necessarily be reasonable to expect the claimant to be back in employment - employment suitable to her qualifications and experience, within the two-month period under consideration. I make no finding to the effect that the claimant has not mitigated her loss.

20 The claimant is entitled to two months net salary and two months holiday pay accruing and two months pension contributions. However, I accept that the discretionary bonus would not have been paid to an employee who was working her notice - particularly one who was dismissed for misconduct. Therefore, I reject the claim for bonus. The information with regard to holiday pay outstanding up to the date of dismissal is extremely vague: the burden of proof is on the claimant; I can make no satisfactory finding for and make no award in that respect.

21 I have considered the ACAS Code; and Section 207A and Schedule A to Trade Union and Labour Relations (Consolidation) Act 1992. In this case, the respondent clearly failed at every stage to deal with this matter in accordance with the ACAS Code. This did not become a disciplinary matter at all until such time as the respondent had held a proper meeting with the claimant to explain the need for her to move and listen to her concerns - that didn't happen. If that had happened, and the claimant had still refused to move, under the ACAS Code there would have been a disciplinary meeting and then the claimant would have been entitled to an appeal. Accordingly, I will award a 25% uplift.

Employment Judge Gaskell
1 November 2021