



# EMPLOYMENT TRIBUNALS

**Claimant**

Mr H Hirani

V

**Respondent**

Bellevue Mortlakes Limited

**Heard at:** Watford Employment Tribunal

On: 22 October 2021

**Before:** Employment Judgment Allen sitting alone by CVP

**Appearances:**

**Claimant:** Mr J Mitchell of counsel (and Ms D Thakkar Solicitor, observing)

**Respondent:** Mr H Lewis-Nunn of counsel

**Attending:** Mr Hirani (Claimant) and Mr Varsani witness for the respondent (and Ms S David, pupil - observing)

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

*"This has been a remote hearing which was not objected to by the parties. The form of remote hearing was video. 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 are in a bundle of 150 pages, the contents of which I have recorded. The order made is described at the end of these reasons."*

## JUDGMENT

1. The respondent breached the contract of employment with the claimant by failing to give contractual notice of termination.
2. The respondent will pay the claimant £13,846.15, in lieu of 12 week's contractual notice.

## REASONS

3. The claimant seeks 12 weeks' notice pay under his contract of employment. The respondent disputes this on the grounds the contract never took effect having been frustrated by the Coronavirus pandemic, lockdown and furlough of employees.
4. The Respondent is a company of chartered surveyor's and valuers. The claimant is also a chartered surveyor. The facts in this case are largely agreed and set out in documentation provided in the bundles.

### Background

5. Mr Michael Yianni set up the respondent company and took the lead in the negotiations to employ the claimant. He did not give evidence today nor did co-director Mr Ali and neither have provided statements. Mr Varsani, the respondent's witness is also a director. The claimant and the respondent's directors have been known to each other for many years (the directors Mr Yianni and Mr Ali since approximately 2000). Some of the respondent's personnel; employees and directors, had been trained by and or worked with the claimant in the past and knew his worth. The respondent's directors had been courting the claimant to join them since approximately 2004. Eventually, after an extended period of negotiation commencing in 2018 a contract was agreed; signed on **21 February 2020** by the claimant and on **24 February 2020** by Mr Yianni to commence employment with the respondent company on **4 May 2020**. The claimant tendered his resignation to his employers on **24 February 2020**.
6. Then the pandemic reached the United Kingdom and it is a matter of public record 'lockdown' commenced on **26 March 2020** [Spain and Italy were reported to have commenced on **21 February 2020**].

### The negotiations

7. At pages 1-93 of the bundle are communications between the parties. Unlike the usual formality expected in such negotiations these demonstrate a warmth and familiarity that shows the value placed on the personal relationships existing between the claimant and the respondent's directors especially Mr Yianni. The following phrases give a flavour of those relationships:
  - a. *'Hi Teacher' (page 52)*
  - b. *'Aloha Michael' (page 58)*
  - c. *'..we can only afford 1 more person and we without any doubt would like that person to be you. I have also postponed various other interviews and chats with potential candidates awaiting for you.'* (page 59)
  - d. *'of course, as can be appreciated it's a strict condition that colleagues do not undertake any private work, however you are a dear friend to us all and*

- mentioned you do the odd case to pay for your basic expenses to maintain PI, etc is absolutely fine.'* (page 72)
- e. *'For us Hirji we trust you as a friend, you are not a stranger we never met but a honest and highly respect friend. We would always look after you and do the right thing THUS this type of paperwork in my world, when it comes to trusted friends is bordering irrelevant BUT I'm sure you are right and safe to have in place.'* (page 75)

### The Contract

8. The following contractual terms were highlighted during the hearing:

- 8.1 Clause 5 - Remuneration - £60,000 per annum paid in 12 monthly instalments after deductions (£5,000 per month before pension, tax and national insurance deductions).
- 8.2 Clause 7 - Role - checking reports, Queries, Auditing, compliance, training, quotes, interview, template improvement, networking/generation of new business, professional work/valuations.
- 8.3 Clause 8 - Licences/Authorisation - requirement to maintain RICS membership and valuation authorisation needed to practice as a chartered surveyor.
- 8.4 Clause 15 - Termination of Employment - contractual notice of 12 weeks on either side.

### Commencement postponed

9. On **1 April 2020** - Mr Yianni wrote to the claimant expressing regret that it was necessary to defer the claimant's **4 May 2020** start date for:

*'1 month or until things return to normal. .... We must assess this again at the end of May';*

but restating the wish to work with the claimant in the near future (Page 105). The email followed a telephone conversation between the claimant and Mr Yianni earlier that day.

### Interim consultancy work

10. On **1 May 2020**: - Mr Yianni wrote to the claimant telling him 90% of the respondent's staff were on furlough. Again, Mr Yianni writes that the respondent is committed to working with the claimant and is looking at an interim solution until things improve that being an offer of consultancy work to be paid at 50% of the company fee (20% above what they would usually pay for such work). Mr Yianni describes this as a short-term measure until *'we can resume the relationship we originally intended and still very much wish for'*. Mr Yianni goes on to recount how the respondent company has cancelled offers to other 'hires' until 2021 (Page 107).

11. **90 Minutes later** the claimant responded making a counter proposal to agree the consultancy fee of 50% as temporary remuneration under the contract. (Page 108)
12. Mr Varsani confirmed today the remaining 10% of staff who continued to work during the furlough amounted to the 3 directors and 2 admin staff and that the respondent's workload had contracted to approximately 15% of its pre-covid level. Claimant's counsel pointed out the stamp duty amnesty that was introduced in 2020 to keep the housing market moving and that the respondent's workload should not have contracted so dramatically. Mr Varsani responded that whilst that was true it did not encourage lenders to offer mortgages and in many cases mortgage offers were withdrawn. Whilst it was pointed out on behalf of the claimant this was not supported by documentary evidence it is very much in line with what I have seen in similar cases and I have no reason to doubt workload did contract as asserted.
13. There was no more correspondence on this interim proposal and no consultancy work was passed to the claimant. Mr Varsani explained that the respondent viewed the counter proposal as a rejection of Mr Yianni's offer.
14. However, in **July 2020** the respondent made a second offer of consultancy work which the claimant accepted. The respondent viewed this as consultancy work and the claimant considered it to be performed under the contract pursuant to his counter proposal sent on **1 May 2020**.
15. Other than the following correspondence there is no documentary evidence of how this work was allocated and on what basis.
16. See paragraph 11 below re telephone conversation between the claimant and Mr Varsani on **17 June**. There is no evidence there was any further discussion about consultancy work during this call however the call followed the claimant's reminder to the respondent that he had received no such work.
17. On **17 July 2020** the claimant sent a text to the respondent referring to valuation reports and valuer's advisory clauses (Page 114). This was followed up on **21 July 2020** with an almost identical email (Page 119). On **7 August 2020** the claimant emailed the respondent's directors pointing out he had not received a response and proposing to archive the research work (Page 121).
18. It is agreed the claimant did not submit an invoice for this work. However, no claim is pursued in respect of this work.

#### RICS valuer's registration

19. There is no dispute between the parties that the respondent did indeed pay for the claimant's registration. On **5 June 2020** the claimant wrote to the respondent asking for confirmation of his status since he needed the respondent to sponsor his registration. He also pointed out he had received no consultancy work (Page 110).

The claimant had a telephone conversation with Mr Varsani on **17 June 2020** and this was followed the next day (**18 June 2020**) with an email providing the claimant with a valuer's registration code. (Page 113) the email contains no information other than the code.

### Employment elsewhere

20. On Sunday **28 June 2020** the claimant sent a text to Mr Varsani referring to a conversation they had the preceding Friday about a vacancy with another company and asking for the details so he could send them a CV. (Page 114). On **13 July 2020** Mr Varsani sent the claimant contact details for an inhouse valuer/auditor vacancy (Page 115). Together with an email introducing the claimant (Page 116).

### Termination of Contract

21. On **1 October 2020** the claimant emailed Mr Varsani pointing out he had received no referral work since 1 May and that his valuer's registration was due to expire on **25 November 2020**. He goes on to ask if the contract of employment is to be terminated (Page 122).

22. On **6 October 2020** Mr Varsani responded that the respondent needed to terminate the contract (Page 123); there is no mention of notice.

23. Approximately **30 minutes later** the claimant sent another email to Mr Varsani asking for clarification that the contract was to be terminated '*forthwith*' and that he would not receive notice (Page 124).

24. The claimant followed this with another email on **23 October 2020** this time asking where his notice period was (Page 125). About **an hour later** the claimant sent another email stating the word period should have read payment (Page 126).

25. On **26 October 2020** a number of emails were exchanged between Mr Varsani and the claimant:

25.1 **9:51am** Mr Varsani - email - stating Mr Yianni was on a 1-year sabbatical and clarifying that his email of **6 October 2020** had been intended to '*provide you notice of termination of our agreement*' (Page 127).

25.2 **11:10am** Claimant - email - to all 3 of the respondent directors. Pointing out the termination was without consultation and that his email referring to notice pay had not been addressed (Page 128).

25.3 **11:15am** Mr Varsani - email - inviting claimant to call him (129).

- 25.4 **2:17pm** Mr Varsani to claimant - text - asking him not to contact Mr Yianni anymore and that he would be taking any matters forward (Page 117).
- 25.5 **3:18pm** Claimant - email - asking Mr Varsani how he proposed to deal with the claimant's email of 11:09am; referred to as 11:10am above (Page 131).
26. On **23 November 2020** the claimant received a solicitor's letter on behalf of the respondent setting out its position (Pages 136-8). Namely:
- 25.1 Termination was on notice
- 25.2 The claimant had accepted an interim arrangement; and
- 25.3 In so doing had accepted it was not possible to perform the original contract
- 25.4 Alternatively, without a revised start date the contract was postponed indefinitely
- 25.5 Mr Varsani gave notice of termination on 6 October 2020
- 25.6 12 weeks' notice is due to expire on 29 December 2020
- 25.7 Because the contract start date was postponed and work under the contract never commenced there is no entitlement to payment.
27. On **24 November 2020** the claimant wrote in response (Pages 139-40). He asserted that:
- 26.1 The consultancy work was an amendment to his contract;
- 26.2 He received consultancy work in July 2020;
- 26.3 For which he was unpaid;
- 26.4 Fee for £750 remains outstanding;
- 26.5 Termination of contract was forthwith and not on notice as asserted by the respondent;
- 26.6 The claimant also pointed out that there was a potential conflict of interest between the respondent's solicitors as he had been engaged by them as an expert witness on a number of occasions and was so on the date of his letter.
28. The claimant received notification of termination of contract on **6 October 2020**. Whether this was summary or on notice is disputed.

## The Law

29. **Withdrawal of a job offer** that has been unconditionally accepted can constitute termination of a contract of employment, and hence potentially amounts to a dismissal, even if the employee has not started work under the contract.

28.1 This was confirmed in Sarker v South Tees Acute Hospitals NHS Trust 1997 ICR 673, EAT, where employment was offered and accepted in August but it was agreed that S would not start work until October. The EAT held that the Trust was in breach of contract when, in September, it sought to withdraw the job offer. The EAT rejected the Trust's argument that, before October, there was merely an agreement to enter into an employment contract. The proper analysis was that the contract of employment had been formed in August and the parties had merely agreed to delay its performance.

28.2 This analysis later met with the approval of the President of the EAT, Mr Justice Langstaff, in Welton v Deluxe Retail Ltd t/a Madhouse (in administration) 2013 ICR 428, EAT. The principle adopted by the majority in Gunton v Richmond upon Thames LBC [1981] Ch. 448, [1980] 7 WLUK 37, and the reasoning in Sarker v South Tees Acute Hospitals NHS Trust [1997] I.C.R. 673, [1997] 3 WLUK 580 all coincided: once a contract such as that in the instant case was made, it was one "of employment". Though not requiring performance of actual work until the week beginning March 8, 2010, it governed relations between W and D from its inception.

28.3 McCann v Snozone 2016 a judgment of the employment tribunal at first instance. A case not that dissimilar from this one except that the respondent denied an offer of employment. ET Judge Ord found on the facts the claimant had been offered a contract of employment but without start date and salary set at a vague mid-range point between £28,000 & £35,000. He found that Mr McCann was entitled to payment in lieu of notice and awarded a sum equivalent to 1-month salary there being no contract and therefore no contractual notice period the award being therefore what was reasonable in the circumstances. (£32,500 per annum / 12 months = £2,708.34).

## Frustration

30. In Notcutt v Universal Equipment Co (London) Ltd 1986 ICR 414, CA, the employee suffered a heart attack in 1983 at the age of 63, after which he was off work until his own doctor wrote in July 1984 to say that he doubted that N would ever work again. As a result, the employer gave N 12 weeks' notice. N then brought a county court claim for pay during the notice period. The judge found against him on the ground that his contract had already been frustrated before the purported notice was given, when it was agreed that he would never work again. The fact that N was given notice did not make the doctrine of frustration inapplicable. The Court of Appeal subsequently upheld this finding.

31. Davis Contractors Limited v Fareham Urban District Council 1956. The plaintiffs agreed to build houses for the defendants. The work was to be completed within eight months. Owing to bad weather, but more particularly to an unforeseen shortage of available labour, due to an unexpected lag in the demobilisation of troops after the war, the work took 22 months to complete. **Held** if delay occurred through no one's fault, that might be in the contemplation of the contract and there might be provision for extra time being given; to that extent the other party took the risk of delay; but he did not take the risk of the cost being increased by such delay; it might be that delay could be of a character so different from anything contemplated that the contract would be at an end, but in this case the most that could be said was that the delay was greater in degree than was to be expected; it was not caused by any new and unforeseeable factor or event; the job proved to be more onerous but it never became a job of a different kind from that contemplated in the contract.

### Conclusion

32. What was the status of the contract following postponement of the start date?

Sarker v South Tees Acute Hospitals NHS Trust 1997 ICR 673, EAT, Welton v Deluxe Retail Ltd t/a Madhouse (in administration) 2013 ICR 428, EAT. Gunton v Richmond upon Thames LBC [1981] Ch. 448, [1980] 7 WLUK 37, referred to above are clear guidance of the status of the contract namely: withdrawal of a job offer that has been unconditionally accepted can constitute termination of a contract of employment, and hence potentially amounts to a dismissal, even if the employee has not started work under the contract. In this instance the commencement date was postponed initially to the end of May 2020 or some unspecified date in the future when things pertaining to the pandemic improved. It was only when the claimant asked if the contract was going to be terminated (1 October 2020) that the respondent in the person of one of its directors responded in the affirmative.

33. Was the claimant entitled to notice under the contract even though its commencement had been postponed? Applying Sarker above the answer is clearly yes. Once the contract was made, it was one "of employment". Though not requiring performance of actual work until the date of commencement which had been postponed to some vague date in the future when things had improved, it governed relations between the claimant and the respondent from its inception.
34. The case of McCann v Snozone above to which I was referred is in line with these authorities.

35. In the circumstances the claimant was entitled to notice under the contract.

### Frustration

36. I am not persuaded by the respondent's argument that the pandemic was an unreasonably foreseeable event which made the future performance of the contract



either impossible or something radically different from what was initially contemplated by the parties.

*'Courts and tribunals are generally reluctant to find that a contract of employment has been frustrated and will require strong evidence before allowing such an argument to succeed. One reason for this is that the doctrine of frustration sits uncomfortably with the modern-day employment relationship and is difficult to marry with the statutory protection now afforded to employees. The burden of proof is on the party asserting that the contract has been frustrated, and the existence of any term in the contract — whether express or implied — indicating (even vaguely) that the contract may continue in the circumstances will militate against a finding of frustration. Where the frustrating event has been caused by the fault of either party, that party will not be entitled to rely on the event to treat the contract as at an end'* Chapter 13 - Frustration - IDS handbooks.

37. It is a matter of public record that the pandemic had reached Italy and Spain at the end of January 2020 and both countries went into 'lockdown' on 21 February 2020; coincidentally the day on which the claimant signed his contract. The progress of the pandemic went on to be widely reported on a daily basis.
38. Some of the case law I have been referred to deals with situations where the contract was frustrated by the employee's poor health, in one case the employee suffered a heart attack and would never work again (Notcutt). Other examples include the total destruction of the work place leading to the work force becoming redundant.
39. I have found the case of Davis Contractors Limited v Fareham Urban District Council 1956 particularly helpful here. In that case the claimant was unable to comply with a contract due to a shortage of available labour and relied upon this fact as frustration of the contract. The House of Lords held that whilst this fact made the contract more onerous it was not frustrated.
40. In the instant case the business continued, although with staff being furloughed or working from home and the workload being much reduced. Performance of the contract in this case was onerous but not 'impossible' or 'radically different' from what was initially contemplated. The nature of the consultancy work offered to the claimant was within the roles and responsibilities contemplated by the contract. In fact, on 6 October Mr Varsani expresses the intention to continue to refer such work to the claimant on an '*as and when basis*' which leads me to conclude that the work would not have been either impossible or radically different from that contemplated by the parties.
41. The circumstances of the business had changed due to the pandemic and the fall off in workload. It would have been onerous for the respondent to continue with the contract but I am satisfied the contract was not frustrated.

Work carried out in July 2020

42. What is the status of the work undertaken by the claimant in July 2020 and did it amount to commencement of the contract?

I am satisfied that the break of approximately 2 months between the initial offer of consultancy work on **1 May** and the second offer in **June/July** breaks any link between the two and is a completely new offer of consultancy work which the claimant accepted. That the claimant interpreted it as acceptance of his counter offer is not reasonable given the interval. Consequently, I am also satisfied that this does not represent commencement of the contract as suggested by the claimant notwithstanding that the work involved was work that was contemplated under the contract had it commenced on 4 May as original intended.

Claimant tied to the Respondent by the contract?

43. In the claimant's skeleton argument, he asserts the contract prevented him from working for anyone else; that is incorrect. Mr Yianni made it plain in pre-contract negotiations that the claimant was free to take on 'Private work'. Further the termination clause of the contract allowed the claimant to give notice at any time and accept employment elsewhere. The respondent actively set out to assist the claimant in finding alternative employment and whilst no one has said as much I think it most likely that had such efforts been successful the respondent would have waived any contractual obstacles to the claimant taking up such employment.

Termination

44. What was the effect of Mr Varsani's email of 6 October 2020?

45. Was it termination of contract on 12 weeks' notice?

It was not. Mr Varsani's email of 6 October makes no mention of notice and talks only of terminating their agreement with regret. There is nothing contained within the email upon which any reasonable person could conclude the intention was to terminate on notice. The claimant responded within 30 minutes asking for clarification of the nature of the termination; specifically, whether it was 'forthwith'. Mr Varsani had ample to time to respond with the requested clarification. He did not.

46. Was it summary termination of contract?

I am satisfied the language used leads to only one conclusion, that this was termination of the contract without notice.

47. The parties agreed that the appropriate sum in respect of 12 weeks' notice is £13,846.15.

Case Number 3300073.2021

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Employment Judge Allen

Date: 8/12/2021

Sent to the parties on: 24/12/2021

N Gotecha

For the Tribunal Office