



EMPLOYMENT TRIBUNALS

Claimant

Mr J Uttley

v

Respondent

Chablais Sport GB Ltd

Heard at: Leeds by CVP

On: 6-7 January 2022

Before: Employment Judge O'Neill

Appearance:

For the Claimant: In person

For the Respondent: Mr P Maratos Consultant (Peninsular)

Judgment

The claim for unfair dismissal (S104) ERA fails and is dismissed.

Reasons

1. Claims

The only claim before the tribunal was for automatically unfair dismissal for having asserted a statutory right (S104 Employment Rights Act 1996) (ERA) as identified by Judge Cox at the Preliminary Hearing, the other claims having already been dismissed.

2. Background

The claimant's employment ended when he had been employed for less than two years. He is therefore not entitled to make a claim for ordinary unfair dismissal because of the continuous service requirement. He makes his claim under section 104 ERA, asserting a statutory right, which section does not stipulate a service requirement. Because the claimant has less than two years' service the burden of proof is upon him to show that the reason for dismissal falls under section 104 ERA.

3. Law

3.1 S104 Employment Rights Act 1996.

3.2 In respect of the burden of proof which falls on the claimant as he has less than two years' service (SMITH (appellant) v. THE CHAIRMAN AND

OTHER COUNCILLORS OF HAYLE TOWN COUNCIL (respondents) -
[1978] IRLR 413)

4. Issues - Unfair dismissal

4.1 Was the claimant dismissed?

4.2 If the claimant was dismissed, what was the reason or principal reason for dismissal

4.3 Was the reason or principal reason for dismissal for having asserted in good faith a statutory right – the right to payment of wages properly payable and the obligation on the employer to deal properly with the deductions made for tax, NI and pension contributions.

4.4 If so, the claimant will be regarded as unfairly dismissed.

5. Evidence Witnesses

5.1 The respondent witnesses were Mr Paul Jago and Ms A Goluch. Each produced a written witness statement, which was signed and dated on the day of hearing. The witness statements were taken as read and the witnesses cross-examined.

5.2 Ms Goluch gave her evidence in Polish through an interpreter. The tribunal is very grateful to Ms Mills the interpreter.

5.3 I gave little weight to the evidence of Ms Goluch, who I found to be honest but unreliable witness. She explained that she left all matters relating to the management of the claimant and the running of the UK company to Mr Jago. In her statement she made a number of assertions, but in cross examination, and in questions from me she was unable to provide further details or examples and did not know the answers to many questions. She asserted that the dismissal was not linked to the claimant having asserted a statutory right, but did not know the reason for the dismissal. She claimed not to be aware that the claimant had asserted various statutory rights, notwithstanding the fact that key emails had been copied her.

5.4 The claimant produced a witness statement which was signed, dated and adopted on the day of the hearing. He was cross-examined.

5.5 The claimant also produced a witness statement for Mr Chris Emmel, which was signed, dated and adopted at the hearing. The respondent elected not to cross examine Mr Emmel. I gave little weight to the statement of Mr Emmel as it had little relevance to the issues to be decided.

5.6 The claimant also produced a witness statement for Mr G Bielby, which was signed, dated and adopted at the hearing. The respondent elected not to cross examine Mr Bielby. I gave little weight to the statement of Mr Bielby as it had little relevance to the issues to be decided.

6. Evidence Documents

6.1 There was an agreed bundle of documents, paginated and indexed and running to 426 pages.

6.2 At the hearing, the respondent sought to add a further 60 pages to the bundle. The 60 pages, did not reach me until after lunch on the first day. I refused to admit a further 60 pages at such short notice, but agreed to consider any document which the parties wished to put to a witness. In the event the respondent sought to introduce only one document which the claimant agreed to add. That document is headed guidance Monday with John and the claimant agreed to its introduction.

7. Findings

Having considered all of the evidence both oral and documentary I make the following findings of fact on the balance of probabilities which are relevant to the issues to be determined. Where I heard or read evidence on matters on which I make no finding or do not make a finding to the same level of detail as the evidence presented to me that reflects the extent to which I consider that the particular matter assists me in determining the issues. Some of my findings are also set out in my conclusions below in an attempt to avoid unnecessary repetition and some of my conclusions are set out in the findings of fact adjacent to those findings.

7.1 Chablais Sport is a European brand which produces and sells sportswear, including football shirts and is jointly owned by Mr Jago and Ms Goluch. In or about July 2019 Mr Jago set up the respondent company Chablais Sport GB Ltd to develop the business in the UK. Mr Jago was not a shareholder or director of the Respondent company, he styled himself as a management consultant to the shareholders and the shareholders were predominantly members of his family and Ms Goluch. The respondent company was started from scratch and the setup was funded by Mr Jago and Ms Goluch and continue to be funded by them throughout the claimant's employment because the respondent operated at a loss. Ms Goluch concentrated on the business in Poland and left the UK operation entirely to Mr Jago. Mr Jago was effectively in charge of the business in the UK. He became a director of the respondent company in July 2021.

7.2 The claimant was employed as sales director, his employment began on 1 September 2019. He was the only employee and it was his role to develop the business in the UK by making contacts with UK football clubs and their support organisations in order to produce commemorative football shirts to sell to fans through those organisations and through the respondent's website and eBay shop. The claimant also dealt with manual tasks such as dealing with the deliveries and with some administrative duties including banking under the direction of Mr Jago. Mr Jago dealt with the HMRC and the Pensions provider.

7.3 The claimant was nominally a director and registered as such at Companies House. His appointment was made after a series of discussions and an offer email was sent to him on 11 July 2019 and a written contract produced sometime later on or about April 2020. The offer letter says ' an ex officio seat on the board of the new company being set up'. Under the heading Status the contract says ' the holder of the role will be granted an ex officio

seat on the board of Chablis sport GB Ltd'. Neither document expressly says that membership of the board is a condition of employment. However, it was clearly within the understanding of both parties that the claimant would serve on the board.

- 7.4 I accept the evidence of Mr Jago that the claimant's membership of the board was very important to the respondent as he and Ms Goluch were based outside the UK. The claimant was at times, the only director. I also accept the evidence of Mr Jago that it was his view that the directorship gave the claimant greater gravitas when approaching football clubs and supporters' clubs.
- 7.5 However, I also accept the evidence of the claimant that the company was run by Mr Jago and the claimant was not informed of, or consulted about key business decisions, was not provided with management accounts or detailed sales figures and from his perspective, there was little transparency in the business. The claimant carried out the instructions of Mr Jago but felt that he was not being allowed to play a full part as a director.
- 7.6 This led to a difficult relationship between the two key men in the business almost from the outset and the claimant accepted that the email trail between Mr Jago and himself was at times argumentative.
- 7.7 The terms of employment provided, among other things, for a basic annual salary payable monthly, expenses and pension contributions.
- 7.8 In the course of the claimant's employment the company was frequently in breach of contract by reason of late payment or short payment of wages. In or about January 2021 the claimant received a letter from Smart Pensions the pension provider, informing him that pension contributions had not been paid. The claimant began making enquiries about this and was assured by Mr Jago, who was responsible for all dealings with the pension provider and the HMRC, that this would be sorted out.
- 7.9 Matters came to a head in May 2021 by which time the claimant had a number of concerns. The claimant had not had his P60 for the year ending April 2021 and began to make enquiries of the HMRC. He was informed by the HMRC that his tax and national insurance (which had been deducted and shown on his payslips) had not been passed to the HMRC since May 2020, a year ago. The staff at the HMRC also informed him that a P 45, had been submitted indicating that his employment with the respondent had ended in May 2020. His enquiries of the pension provider revealed that his pension contributions not been paid since November 2019. On 18 May 2021 the claimant raised a grievance by email, asserting his statutory rights concerning the company's failure to pay wages properly payable, the deduction of tax and National Insurance, which have not been passed to the HMRC, the deduction of pension contributions which have not been passed to the pension provider, together with the failure on the part of the respondent to pay their pension contributions to the provider. The grievance letter also states that the claimant has been in contact with ACAS and the pensions ombudsman as well as the HMRC.
- 7.10 This initial grievance made on 18 May 2021, was followed up by further complaints in June and July 2021 concerning the respondent's failure to

resolve these issues and on 7 June 2021 the Claimant began Acas early conciliation.

- 7.11 Mr Jago admits that the respondent was in breach of contract and had failed to pay the wages properly payable and had failed to make the tax, NI, and pension contributions, and accepts that the claimant's grievance and complaints were made in good faith and that his complaints constituted an assertion of his statutory rights. Mr Jago refutes the allegation that the respondent submitted a P 45 in May 2020 in respect of the claimant, and that remains a mystery to both parties.
- 7.12 Mr Jago, in his email in reply of 18 May 2021(17.58) appears to have been irked by the reference to ACAS as his comment 'your friends and ACAS will confirm that for you...'. However, he says he will draw up a payment schedule at the weekend and consider how the directors can rectify the situation. In the email trail that follows, although Mr Jago does not share the claimant's views regarding the directorship, he accepts the company is responsible for the employment rights issues and appears anxious to address them. There is no suggestion in that trail that he resented the claimant having raised those concerns or having sought advice from others, including Acas. In his email of 2 June 2021 Mr Jago asked the claimant to write as a director of the company to the HMRC for a copy of the P 45. In that email he also offers to pay for the claimant to receive advice from solicitor. The above email of 18 May 2021, is the only email that the claimant has drawn to my attention indicating Mr Jago's antipathy.
- 7.13 The claimant was becoming increasingly worried about his personal position as a director of the respondent company and the prospect of personal financial liability given the company's apparent precarious financial state. He had raised this with Mr Jago and despite Mr Jago's assurances, the claimant decided to resign as a director. His letter of resignation was sent by email on 4 June 2021 and reads as follows:
- 'having met with the citizens advice bureau this morning to discuss the current ongoing situation. Having taken their advice I wish to resign as a director from Chablais Sport GB with immediate effect. I believe my role is not the role of the director, as explained in my grievance procedure letter, therefore I wish to continue employment in a Senior Sales role only. Could you please remove my name from Companies House'*
- 7.14 Following this resignation letter there is a notable change in the tone of Mr Jago's emails. Mr Jago, in his reply of 5 June says he will respond after the weekend but then went on to restrict the claimant's access to email and other matters. *' Until then I remind you that the licence clearly notes that the use of the name Chablais sport in electronic and any other form remains the sole property of Chablis sport (the brand owner, not the GB company). That includes any email account bearing the name Chablis sport such as the one you wrote from to me. Until your resignation is sorted out. Please use your personal email for correspondence. Until matters are sorted out. It would be a breach of copyright to refer to Chablis sport in any way other than to your formal legal representatives or to use emails or other forms of communication owned by Chablis sport.'*

7.15 In a subsequent email of 5 June 2021 Mr Jago says that it is normal to disable an employee's email when someone resigns with immediate effect and goes on to say that he, Mr Jago will be responding to customers and that the claimant should not do so. Again, I find this to be indicative of a significant change in tone and in Mr Jago's perception of the relationship.

7.16 The claimant in response emailed on 5 June 2021 to say '*I emphasise I do not wish to resign from the company. Only my role as director*'. The claimant in a number of subsequent emails has maintained his position that he intends only to resign as a director and has not resigned as an employee. The Respondent accepts that was the Claimant's intention but declines to accept that it is possible for the Claimant to resign from one without resigning from the other.

7.17 On 7 June 2021 Mr Jago wrote to the claimant with three options, namely '

- a) a return to the status quo ante (ie to restore the claimant to the role of sales director and to the board)*
- b) working with us to resolve the company's annual problems, but not in the status quo ante*
- c) a continuation of the current confrontational approach*'.

Although the claimant began his ACAS early conciliation period on 7 June 2021 that would not have been known to Mr Jago when he wrote this email and, in any event, I find the body of the email to be conciliatory and not indicative of an adverse reaction to ACAS early conciliation.

The email goes on to reassure the claimant that he is not personally liable for company debts and clarifies the activities that the claimant is permitted to undertake. The email closes with the statement '*our preference would be to solve every problem through option a) followed by b). If you choose c) you must expect the company to defend itself vigourously...*'

7.18 A further email of 7 June 2021 from Mr Jago to the claimant again offers the claimant's the opportunity to take legal advice at the company's expense. The email sets out Mr Jago's position, which is in terms that the claimant is not entitled to unilaterally redefine his role and the company require him to be both a sales director and continue as a board director. In that email Mr Jago sets out his view of the importance of directorship status when representing the respondent with the football clubs and the supporters clubs.

Mr Jago's position is and continues to be that the directorship cannot be separated from the sales role unless the company reaches an agreement to vary the terms of the claimant's employment. It is the claimant's position and continues to be that he is at liberty to resign from his position as director without resigning from his role as employee.

From then on, the claimant and Mr Jago each re-asserts his own perspective but a resolution is not found.

- 7.19 By email of 21 June 2021 the claimant purports to withdraw his resignation as a director following Mr Jago's reassurances that he is not responsible for the company's debts. Mr Jago in reply acknowledges the intention to withdraw the resignation and says he will notify the shareholders. The shareholders did not meet until 29 July 2021 to determine the matter and did not accept that withdrawal.
- 7.20 By email of 28 June 2021 the company appeared to be offering the possibility of a reset involving the claimant returning as a board director for the time being and resuming his role as sales director until 18 July 2021 when the shareholders would meet to discuss the possibility of releasing him from the requirement to be a director and to engage him in a sales only role which would depend on new directors being recruited. It would appear from his email of 1 July 2021 that Mr Jago understood that this reset had been refused by the claimant. The email of 1 July 2021 ends by stating that impasse has been reached and the tribunal might be the best way to break the deadlock. In his email of 1 July 2021 in reply, the claimant asks if the reset is still on offer and what he has to do. This appears not to have been clarified by Mr Jago who in the following emails indicates that the matter will be dealt with at Tribunal and therefore I infer that the reset has been withdrawn but it appears that the claimant continues in employment and continues to be responsible for meeting some clients. On 20 July the Claimant seeks clarification of his employment status from Mr Jago who replies to the effect that the Company regards him as having resigned but with an agreed extension to the notice period to 18 July 2021 (when the shareholders were expected to meet) while his request for an alternative role is considered. The Claimant continued in employment until 31 July 2021.
- 7.21 The shareholders did not meet on 18 July 2021, but held a remote meeting on or about 29 July 2021 and on the same date, Mr Jago and Ms Goluch (who are now both Directors), wrote to the claimant in the following terms *'the shareholders and the board are in agreement that the company sales projection should be represented by a person at board level. Although the volume of both sales and new clubs has risen in the last couple of months there is no room yet in the structure for employment in other roles. We will now recruit people to represent us on a similar arrangement as ambassadors, but at a more senior level of which we will have three. One will cover the North of England one the South and another in London. Scotland is being separated out.*
- On that basis, with no role as employment below the role you resigned from the company is unable to extend your employment and must regard your extended period of notice of having expired. We will consider 31st of July as your last day of employment. You are to be paid up to that date. Your expenses will be paid on receipt of your expenses claim for July.'*
- 7.22 Mr Jago and the claimant accept that this letter brought the claimant's employment to an end on 31 July 2021. The claimant had made it clear throughout that he did not intend to resign from his employment and this was understood by the respondent. I find therefore that the respondent's letter has brought the employment position to an end and the respondent dismissed the claimant on 31 July 2021.

7.23 The respondent relies on the above as the reason for dismissal, namely that the sales director should be a member of the board and there was no other position available to the claimant.

7.24 The respondent then purports to issue the claimant with another letter of dismissal on 2 August 2021, summarily dismissing the claimant for gross misconduct as from 2 August 2021. This was issued without any adherence to a fair procedure and was also issued after the employment had been terminated. The respondent relies on two elements of misconduct, namely upward bullying and making payments from the bank account without authorisation. Having read the emails relied on as evidencing so-called upward bullying there is absolutely no evidence of any bullying on the part of the claimant and this allegation is entirely without foundation. The respondent has identified a number of payments made by the claimant in the period 11 to 16 July 2021, which they rely on as acts of gross misconduct. On each occasion the respondent was notified of the payments and there is absolutely no grounds for alleging dishonesty on the part of the claimant. At the time the payments were made, no warning was given to the claimant that this constituted wrongdoing likely to lead to dismissal or at all. I find these allegations of gross misconduct to be entirely without foundation and were added after the event as a makeweight. I find it indicates Mr Jago's determination to be rid of the claimant and the complete breakdown of their relationship.

Conclusions

1. The respondent has accepted that it has been in breach of contract regarding the claimant's pay, deductions for tax, National Insurance and pension and the respondent's pension contributions.

The respondent further accepts that the claimant has taken steps to assert his statutory rights in good faith by raising a grievance on 18 May 2021 and making further complaints about the above and by consulting ACAS, the CAB, HMRC, the Pensions Ombudsman, and pension provider and commencing Acas early conciliation.

2. I find the claimant to have been dismissed on 31 July 2021 by the respondent's letter of 29 July 2021.
3. The respondent relies on the reasons set out in that letter, in summary that 'the company sales projection should be represented by a person at board level' and there was no room for an additional more junior role at that time given the Company's financial position. The claimant asserts that the real reason for the dismissal was the fact that he had asserted his statutory rights
4. Because the claimant has less than two years' service he cannot bring a claim for ordinary unfair dismissal under section 98 ERA. He has brought his claim under section 104 ERA. Because he has less than two years' service the burden of proof is upon the claimant to show that section 104 ERA applies.

Under section 104 it does not matter how badly the claimant has been treated, or whether a respondent has failed to adopt a fair procedure or has failed to address grievances in a timely manner or under and reasonable procedure, or that the claimant has suffered serious financial embarrassment because of the

the respondents failure to pay his wages , or that the respondent has failed in its duty to the state and to the claimant to pay over the appropriate tax, National Insurance and pension contributions.

It does not matter whether the claimant had good reason to be concerned about his position as a board director in circumstances where there appeared to be insufficient funds to pay wages, and where tax, National Insurance and pension contributions had been withheld, and he was excluded from the decision-making process, was denied access to financial accounts and details, or whether there was a lack of transparency within the company.

The only issue in this case is whether the claimant has shown on the balance of probability that he was dismissed because he had asserted his statutory rights.

5. At the onset of the employment there was a clear understanding on the part of both parties that a board directorship was attached to the employment role of sales director. I accept the evidence of Mr Jago that this was a matter of great importance for the sales director to also be a board director and that it was his view that in the world of English football board director status conferred some gravitas on the role without which a sales director would not be taken seriously. I accept Mr Jago's evidence that the company considered the directorship to be an integral part of the claimant's role and in their view, he could not do one without the other.
6. I have considered whether at the various milestones in the claimant's history of grievances and complaints there was a trigger point, after which the relationship seriously and adversely changed and / or whether such a milestone resulted in antipathy on the part of the respondent and led to the dismissal and I find that there is none.
7. Following the submission of the grievance on 18 May 2021 Mr Jago may have been slightly irked, but thereafter he acknowledged the respondent's responsibilities, offered to pay for legal advice and apart from the reference to 'friends at ACAS' there is no indication of antipathy in the email trail between 18 May 2021 and 4 June 2021.
8. On 4 June 2021 the claimant purported to resign his directorship, and after that there is a considerable change in the tone of the emails from the company and the limitations imposed on him, such as disabling his email and restricting him from contacting clients and that tends to show that this was the turning point in the relationship and supports the respondent's contention of a nexus between this resignation from the board and the dismissal.
9. On 7 June 2021 the claimant began ACAS early conciliation, but it is not likely that the respondent knew this at the time Mr Jago's email of 7 June was written but in any event there is no indication that the ACAS early conciliation period led to any further deterioration in the relationship. In the email of 7 June 2021 the respondent does not immediately seize on the resignation as a reason to be rid of the claimant, but seeks to reassure the claimant and to contemplate seeking a solution and is conciliatory in tone.
10. There then follows a period of impasse in which the claimant is insisting that he has resigned only from his position as director and was entitled to do so and the respondent insisting that the directorship is an integral part of the employment position and with the respondent asserting that the claimant is working his notice which is extended initially to 18 July and then to 31 July 2021, when the

employment was brought to an end by the respondent. In this period the claimant attempted to withdraw his resignation as a director, but this withdrawal was not accepted by the shareholders who resolved on 29 July 2021 that his employment should be ended on 31 July 2021.

11. I find that the steps that the claimant took to assert his statutory right, did not provoke an adverse response from the respondent. His action on 4 June 2021 in resigning with immediate effect from the board was the turning point and the significant factor in the deterioration of the relationship. In the circumstances I find that the claimant has failed to show on the balance of probability that the steps he took to assert his statutory rights were the principal reason for his dismissal.
12. Whatever his status Mr Jago was in reality the person in charge of the respondent company. The claimant was the only employee and responsible for the development of the company sales. By 31 July 2021 their relationship had broken down and as evidenced by the so called dismissal letter of 2 August 2021 Mr Jago was determined to be rid of the claimant.

I accept the respondent's evidence that the dismissal was because of the claimant's resignation as a board director which the respondent considered to be an integral part of the role he was employed to do. I conclude that this led to the ultimate breakdown in the relationship between the claimant and Mr Jago and the claimant's employment was untenable in such circumstances.
13. The burden of proof is on the claimant firstly to show that he has been dismissed and that he has asserted a statutory right in good faith and I find that he has demonstrated those elements.
14. Secondly he must show that there is a causal link between that assertion and the principal reason for his dismissal. I conclude that he has failed to show on the balance of probability such and has failed to show that the principal reason for his dismissal was his assertion of a statutory right.

In all the circumstances the claim for unfair dismissal (S104) ERA fails and is dismissed.

Employment Judge: O'Neill

**Date Signed
8 January 2022**

Sent to the parties on:
11th January 2021