



EMPLOYMENT TRIBUNALS

Claimant: Ms C Marcus-Dew
Respondent: Jublee Number 7 Ltd
Heard at: East London Hearing Centre
On: 27 January 2022
Before: Employment Judge Byrne

Representation

Claimant: Mr Grant Williams, Community Trade Union
Respondent: Neither present nor represented

JUDGMENT

The judgment of the Employment Tribunal is that:-

1. The Claimant's claim for constructive dismissal is upheld.
2. The Claimant is entitled to a remedy in the form of compensation in the amount of £38,491.

REASONS

1 A full ex tempore judgment was given on 27 January 2022 and the reasons were given in that judgment. These written reasons are issued at the request of the Claimant.

2 The first matter to be dealt with relates to the relevance of Rule 47 of the Tribunal's procedural rules. The situation in relation to this final hearing is that there was an appearance on the part of the Claimant but no appearance on the part of the Respondent. Rule 47 provides that if a party fails to attend or be represented at the

hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party and before doing so it shall consider any information which is available to it after any enquiries that may be practicable about the reasons for the party's absence. The Tribunal directed that the clerk connected with this hearing make efforts to get in touch with the Respondent. A telephone call was placed using the relevant details on file but that call was not answered and taking account of that matter and also the submissions on behalf of the Claimant in relation to contacts between the Claimant and the Respondent in the lead up the hearing, the Tribunal is satisfied that, pursuant to Rule 47, this was a case that could proceed in the absence of the Respondent.

3 I move next to the question of the correct name of the Respondent. An application has been made pursuant to Rule 34 of the Tribunal's rules of procedure in circumstances where it has come to the attention of the Claimant, and the Claimant has, in turn, brought to the attention of the Tribunal, that the Respondent's name has been changed with the Companies Registration Office as of 8 December 2021 from 'Clarity Products Ltd' to 'Jublee Number 7 Ltd' (company registration number 12430397). It has been submitted that the correct name of the Respondent, as now described, is Jublee Number 7 Ltd. Submissions have been made as to why an amendment should be made in relation to the name of the Respondent. The Tribunal is satisfied to substitute the name just mentioned for the name currently set down as the Respondent's name and so that amendment is made and will be reflected in the title of this judgment.

4 I next address the question of what facts have been accepted by the Tribunal. The Tribunal notes and accepts that the Claimant was employed by the Respondent originally as head of commercial and then latterly as head of sustainable development, with her employment commencing on 11 April 2015 until her resignation on 23 September 2020. There was a TUPE transfer during that period but that is not material for present purposes.

5 The first matter to be addressed concerns payment of wages. The Tribunal accepts the Claimant's evidence that wages were not paid at all in relation to the months of February, March, June, July and August 2020 and, as regards September 2020, up until the point of the Claimant's resignation on 23 September 2020. The Tribunal further accepts that, in relation to two months, namely April and May 2020, approximately 80% of pay for those months was handed across but that there was a shortfall in relation to those two months. The Tribunal accepts that it is an express term of the Claimant's contract of employment that she be paid a salary of £50,000 on a monthly basis into a bank account and, in this regard, the Tribunal notes at page 65 of the bundle that this term of the contract is described in the statement of terms and conditions of employment which is dated 22 May 2017. The Tribunal finds that on numerous months in the year 2020 there was a failure to comply with that particular term of the contract of employment. I will address the significance of that when I apply the law to the accepted facts.

6 The next headline area that the Tribunal turns to in terms of findings of fact relates to the disciplinary proceedings instituted by the Respondent against the Claimant. The facts are that on 10 March 2020 the Claimant was suspended from her position on full pay. Two weeks later an accusatory letter was sent on behalf of the Respondent to the Claimant setting out a number of accusations against the Claimant as well as demands for payments of substantial sums of monies to the Respondent. There was then a substantial gap in time before the disciplinary process against the Claimant was

progressed.

7 There was a disciplinary hearing originally scheduled for 2 July 2020, whereupon there was a reasonable request on the part of the Claimant for a postponement of that hearing because certain relevant documentation had been received very close to the day of that scheduled hearing. It did not, in fact, take place until 10 July 2020 and then there was another reasonably lengthy period of time before a transcript of that hearing was made available to the Claimant on 2 September 2020. At that time there was a promise that the outcome of the disciplinary hearing would be made available to the Claimant by the end of that week. The Tribunal accepts that there has never been an outcome to that disciplinary hearing.

8 The Tribunal finds those to be the most material facts in relation to this claim and the facts which provide a basis for making an appropriate determination of this claim.

9 I move now to the application of the relevant law in the light of the findings of fact that the Tribunal has just made. The claim is one for constructive dismissal, as described in section 95(1)(c) of the Employment Rights Act 1996. If that is broken down into its component parts, the matters which need to be considered are as follows: whether there is a repudiatory or fundamental breach of the contract of employment by the employer; whether there was a termination of the contract by the employee because of that breach; and finally, whether the employee has lost the right to resign by affirming the contract after the breach, most usually by way of delay.

10 I look now at the first question as to whether there was a repudiatory or fundamental breach of the contract of employment by the employer. The uncontroverted evidence that has been accepted by the Tribunal is that there was a repeated failure to comply with the express term of the Claimant's contract of employment that she be paid on a monthly basis the agreed salary as described in the contract of employment. The Tribunal finds that the numerous breaches of this express term constitute, cumulatively, a repudiatory breach of the contract of employment by the Respondent and, in terms of the length of time between the first breach of that term of the contract until the Claimant's resignation on 23 September 2020, the Tribunal accepts the Claimant's evidence that she was repeatedly promised that the money owed to her would be paid and that she remained in her employment in the reasonable hope that things would come good in the end.

11 Insofar as it might be necessary to find that there was any 'last straw' (and the Tribunal does not find this to be the case given its finding in the last paragraph), the Tribunal accepts that the failure to pay the monthly salary on the last relevant occasion, namely 25 August 2020, is more than capable of constituting a 'last straw' for the purposes of assessing whether there was a constructive dismissal.

12 The Tribunal is satisfied that the Claimant terminated the contract of employment because of the aforementioned breach of contract by the Respondent. The Tribunal finds that the Claimant did not affirm the breach of contract by delay or otherwise. It follows therefore, that in relation to the payment of wages alone, the Tribunal accepts that the Claimant was constructively dismissed.

13 I move now to address the other material area as the Tribunal sees it and that concerns the handling of the disciplinary process brought against the Claimant and the contractual term that becomes relevant here is the implied term of trust and confidence. In short, having regard to what has been accepted by the Tribunal, there has been a very clear breach of the implied term of trust and confidence.

14 The first issue is that within two weeks of the suspension of the Claimant, a communication of a very accusatorial nature was directed to the Claimant which came ahead of any attempt to investigate further or explore the Claimant's version of events; that, in itself, represents a difficulty. However, in addition, there was a substantial lapse of time before any effort was made to advance the disciplinary process against the Claimant. Of particular relevance in that regard is that the decision to suspend the Claimant on strict conditions, including restrictions in relation to communication with others, meant that the process was an exacting one on the Claimant and the Tribunal finds, therefore, that it was incumbent on the Respondent to move the process along with due expedition. There is no evidence to explain the delay in progressing the process because the Respondent has not offered evidence as to why there was a delay in relation to progressing that disciplinary process and the Tribunal is satisfied that that lengthy, unexplained delay in itself breaches the implied term of trust and confidence. Added to that, the Tribunal accepts that the process never in fact reached a conclusion at the point in which the Claimant resigned from her position; she had been promised an outcome to the process but that promise was not fulfilled.

15 The Tribunal finds quite separately from the findings that it has made in relation to the failure to comply with the term of the contract that the Claimant be paid in accordance with that term that there is a separate breach of the implied term of trust and confidence in relation to the entirety of the disciplinary process brought against the Claimant and finds that that breach is repudiatory in nature. The Tribunal finds that the Claimant resigned because of that breach of contract that she did not affirm the breach by way of delay or otherwise. To conclude, then, the Tribunal finds that the Claimant was constructively dismissed and therefore she succeeds in relation to her claim on the ground concerning the implied term of trust and confidence in addition to the payment of wages ground.

16 I move now to the question of remedy and I am now going to address this matter under the relevant headings. The first matter is the question of the basic award and I note that it is claimed on behalf of the Claimant that the relevant basic award is for four weeks by a factor of one given the Claimant's age at an amount of £538 gross week's pay which comes to £2,152. I find that there is no question of any deductions; certainly no evidence has been offered by the Respondent that could affect that calculation. So, the total basic award I find to be £2,152.

17 I next address the question of the compensatory award and, as of the date of today's hearing, find the relevant amount to be 68 weeks x £724.27 which, rounded to the nearest pound, comes to £49,250. I note that the net earnings to be deducted are, as of today, £27,568, which leaves a subtotal of £21,682. There is no question of any deductions being relevant. No evidence has been offered by the Respondent in relation to the headings of mitigation of loss, misconduct before dismissal, or the Polkey principle, so that figure remains undisturbed at £21,682. The question then is whether there should be an uplift in relation to the failure of the Respondent to follow the ACAS Code of

Practice. On the evidence that has been accepted by the Tribunal which, the Respondent having offered no evidence, is uncontroverted, the Tribunal is entirely satisfied that there was a breach of the ACAS Code of Practice in the manner in which the Respondent conducted itself towards the Claimant and finds it appropriate that the maximum uplift of 25% awarded, which is a figure of £5,420 to be added which then leaves a subtotal of £27,102 with no deduction for contributory fault, no evidence having been offered by the Respondent or put before the Tribunal in that regard.

18 The remaining issue then is the heading of estimated future loss. The estimated loss of future earnings advanced on behalf of the Claimant is £265 for 26 weeks, amounting to £6,890. The Tribunal has had regard to the evidence of the Claimant about her efforts to find employment and also the deleterious effect that the disciplinary process had on her professional reputation and is satisfied that that is an appropriate estimate of loss of future earnings. The figure of £500 is appropriate for loss of statutory rights and so that deals with everything in relation to estimated future loss, which comes in at the figure of £7,390. The question arises then as to any appropriate uplift concerning the ACAS Code of Practice and the Tribunal, on the same basis that it gave previously in relation to this matter, finds that an uplift of the maximum 25% is appropriate giving a figure of £1,847, which leaves the subtotal at £9,237; when that is added to the sum already given in relation to the basic award, an initial figure of £36,339 emerges and when all of the aforementioned sums are put together, the final award is in the amount of £38,491. So that is the award the Tribunal finds to be appropriate and the Tribunal directs that the Respondent pay this sum to the Claimant forthwith.

Employment Judge M Byrne
Date: 3 February 2022