



EMPLOYMENT TRIBUNALS

Claimant: Ms S Jenkins

Respondent: Allen & Stone Ltd t/a Hunters

Heard at: Bristol (remotely by VHS/telephone)

On: 20 May 2022

Before: Employment Judge Leverton (sitting alone)

Representation

Claimant: In person

Respondent: Mr James Crumpton, Area Manager

RESERVED JUDGMENT

The Claimant's claim for breach of contract/wrongful dismissal under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (SI 1994/1623) is not well-founded and is dismissed.

REASONS

Claim and issues

1. The Claimant brought a claim for breach of contract/wrongful dismissal under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (SI 1994/1623) ('the 1994 Order') seeking damages in respect of her notice period.
2. It was agreed at the start of the hearing that the issues for the Tribunal to determine were as follows:
 - a. did the Claimant resign on her first day by failing to attend work and/or by failing to contact the Respondent?

- b. if so, did the Claimant resign in response to a fundamental breach by the Respondent of an express or implied term of her employment contract relating to the arrangements for insuring her company vehicle (constructive dismissal)?
- c. if the Claimant did not resign, did the Respondent terminate her employment (express dismissal)?
- d. if the Claimant was dismissed by the Respondent (either expressly or constructively), how much notice pay was she contractually entitled to?

Evidence and procedure

3. The Claimant attended the hearing and gave evidence. The Respondent was represented by Mr James Crumpton, Area Manager. Mr Crumpton told me that the Respondent's Managing Director, Mr Kody Allen, was not able to attend the hearing because he was out of the country. Mr Crumpton gave evidence for the Respondent but he lacked first-hand knowledge of the matters that were in dispute, and I took that into account when deciding how much weight I should attach to his evidence.
4. The Claimant provided a witness statement and 17 email attachments by way of supporting evidence. The Respondent did not provide any witness statements but sent copies of WhatsApp messages and emails to the Tribunal. There was no agreed bundle of documents.
5. The Claimant attempted to join the hearing by VHS but she was not audible. The problem could not be resolved, and she dialled in by telephone. She confirmed that she was happy to proceed with the hearing. Unfortunately, the time spent trying to resolve this technical issue meant that the hearing started late and there was insufficient time for me to reach a decision and give oral reasons. At the conclusion of the hearing, I explained that I would have to issue a reserved judgment.

Findings of fact

6. The Claimant applied through a recruitment agency for a job as a lettings manager with the Respondent. She attended an interview with Mr Allen and Mr Jake Sheldon, Branch Manager, and was successful. She signed an employment contract on 8 September 2021 and returned a copy to the Respondent. Her agreed start date was Wednesday 6 October 2021 and her basic annual salary was £30,000.
7. Clause 3 of the Claimant's employment contract provided: '*The Employee must successfully complete a probationary period of three (3) months (the "Probationary Period") beginning on the Commencement Date. At any time during the Probationary Period, as and where permitted by law, the Employer will have the right to terminate employment without any notice or compensation to the Employee other than wages owed for hours of work already completed.*'

8. Clause 52 of the contract provided: *'The Employee and the Employer agree that reasonable and sufficient notice of termination of employment by the Employer is the greater of four (4) weeks and any minimum notice required by law.'*
9. The Claimant was contractually entitled to a company vehicle. On Tuesday 5 October 2021, the day before she was due to start work for the Respondent, Mr Allen sent her a WhatsApp message attaching a photograph of the vehicle that had been assigned to her. He requested: *'As mentioned in your interview, can you insure it as of tomorrow and we will reimburse you each month as we do for others.'*
10. I accept the Claimant's evidence that this was the first time there had been any mention of a requirement for her to insure the vehicle herself. No such requirement had been mentioned at her job interview, nor in any of her previous email exchanges or conversations with Mr Allen or the recruitment agency. The Respondent disputed this, but Mr Allen and Mr Sheldon did not attend the hearing to give evidence to the contrary.
11. Despite this being the first time that the insurance requirement had been mentioned, the Claimant did not query Mr Allen's WhatsApp request or express surprise. She simply replied: *'I will sort the insurance today. Thank you.'* This was because she did not want to lose a valuable job opportunity with the Respondent. She did raise her concerns with the agency that same day, and the person she spoke to (Gareth) said that he had not been made aware by the Respondent of any requirement for the Claimant to insure the vehicle. The Claimant told him that she would nevertheless investigate the insurance options.
12. The Claimant then attempted to arrange insurance, but the quotes that she obtained were more expensive than she had anticipated. Insurers told her that they would require a large payment up front for the whole year on the basis that the vehicle was modified and sign-written. The Claimant's existing no-claims bonus could not be used because it related to a separate insurance policy for her own car, and this also increased the cost.
13. The Claimant's claim form stated that she was quoted over £1,200 per year by the insurance companies, whereas her witness statement gave a figure 'in excess of £3,500'. In evidence, she initially denied ever having given the lower figure; she then stated that the lower figure included a discount for a no-claims bonus that turned out not to be available. She did not provide evidence in the form of written quotes from insurers. Nevertheless, the key point is that she was being asked to pay a large sum up front to insure the vehicle, in circumstances where the Respondent intended to reimburse her by paying her a proportion of the premium each month.
14. On 6 October 2021 the Claimant did not report for work at 8.30 am as arranged. She was still telephoning insurance companies to try to arrange a policy; she was also reluctant to travel from her home in Cardiff to the Respondent's Bristol office by public transport without any guarantee of an insured company vehicle to drive home at the end of the day.

15. At 8.30 am on 6 October the Claimant left a voicemail message for Mr Allen, which he appears not to have received. At 8.40 am she sent Mr Allen a WhatsApp message explaining that she was having difficulty trying to arrange insurance because all the insurance companies she had spoken to were requesting an upfront payment for a year. She added: *'I will update you once I have made a few more calls. Are there any companies you can recommend as I haven't insured a company vehicle myself before?'*
16. At 8.42 am Mr Allen messaged the Claimant back asking her to call him. She replied at 9.09 am to the effect that she could not do so because she was on hold waiting for an insurance company to answer her call. At 9.10 am, Mr Allen responded: *'No problem. We can organise for you if required.'* In two follow-up messages sent to the Claimant shortly afterwards, he added that the Respondent's Accounts Manager, Danielle Brice, *'knows how to do it'*; he also recommended an insurance company. He received no response, and at 10.53 am he sent the Claimant another WhatsApp message asking for an update. There was no reply.
17. It will be apparent from this account that the messages from the Claimant to Mr Allen dried up after 9.09 am. The Claimant was still on the phone trying to contact insurance companies, and she was spending lengthy periods on hold. She chose to do this instead of reporting for work and attempting to resolve the matter in person; she did not feel confident that there would be an insured vehicle at her disposal if she travelled to Bristol that day.
18. The Claimant told the Tribunal that she made a request via the recruitment agency for Mr Allen to insure the vehicle and send her the insurance documents. Mr Crumpton denied that any such request was made. I find on the balance of probabilities that the Claimant requested the insurance documents via the agency but that her request was not relayed to Mr Allen.
19. At 3.05 pm that afternoon, Ms Katy Thompson at the recruitment agency sent an email to Mr Allen stating that she had left email and voicemail messages for the Claimant but had heard nothing. She added: *'I left a message saying she has a 2 pm cut-off until you withdraw her job offer... I have no clue as to why this situation has occurred. I am at as much a loss as you are.'*
20. Ms Thompson also had a WhatsApp exchange with the Claimant. She had attempted to phone the Claimant, and at 2.56 pm the Claimant messaged her back to say that she was still on the phone trying to sort out insurance and was unable to speak. Ms Thompson replied: *'You need to ring me ASAP please. I left you a voicemail saying Kody was giving you until 2 pm to get in touch, sadly he's now rejected your job offer. I am lost for words why this has happened.'*
21. My finding, based on this evidence, is that at some point after he sent his final WhatsApp message to the Claimant at 10.53 am, Mr Allen contacted the recruitment agency and set a deadline of 2 pm by which the Claimant was to contact him, otherwise he would withdraw her job offer. The agency attempted to communicate this deadline to the Claimant by leaving a voicemail message, which the Claimant unfortunately did not pick up. Mr Allen then withdrew the Claimant's job offer on the basis that she had failed

to call him by his stated deadline of 2 pm. The Claimant was unaware of that deadline until it had already passed and the job offer had been withdrawn.

22. The agency attempted to smooth things over and resolve the situation. Ms Thompson spoke to the Claimant and indicated that there might be a way forward if she sorted out the insurance and contacted Mr Allen. However, the Claimant was aggrieved by the way she had been treated earlier in the day and was not willing to discuss the matter with Mr Allen on those terms.
23. On the following day, 7 October, the Claimant emailed Mr Allen expressing disappointment at the way she had been treated. She stated: *'My choice not to call you and work for you was due to how you treated me.'* The Respondent relied on this sentence as evidence that the Claimant had voluntarily resigned, but I find that it was a reference to her unwillingness to enter into negotiations with Mr Allen at the point when he had already withdrawn her job offer. That interpretation is supported by the fact that the Claimant's email went on to say: *'You withdrew my job offer and then wanted to re-discuss it.'*

Legal framework

24. Section 3 of the Employment Tribunals Act 1996 and the 1994 Order allow employment tribunals to hear breach of contract claims, including claims for damages in respect of notice pay. Article 3 of the 1994 Order provides, in so far as material: *'Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages... if... (c) the claim arises or is outstanding on the termination of the employee's employment.'*
25. Section 86 of the Employment Rights Act 1996 ('ERA') sets out minimum periods of notice required to terminate a contract of employment. These provisions apply only where an employee has been continuously employed for one month or more.
26. If an employee has less than one month's service, the notice required will depend on what has been agreed by the parties or on the common law. At common law, an employee is entitled to reasonable notice of the termination of his or her employment contract. However, an employee who is guilty of gross misconduct or some other repudiatory breach of contract can be dismissed without notice. The test is whether the employee's conduct shows a deliberate intention to disregard the essential elements of the contract.
27. A contractual provision must be drafted in clear and unambiguous terms if it is to have the effect of depriving an employee of notice pay. A purported waiver of the right to notice by the employee must be clear and certain, and any ambiguity is likely to be construed against the employer who is seeking to rely on it – **Skilton v T and K Home Improvements Ltd** 2000 ICR 1162, CA.
28. When construing a contractual term, the context is relevant. A contract should be interpreted not according to the subjective view of either party but

in line with the meaning it would convey to '*a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract*' – Lord Hoffmann in **Investors Compensation Scheme Ltd v West Bromwich Building Society (No.1)** 1998 1 WLR 896, HL.

29. In exceptional circumstances, an employee's conduct may lead a tribunal to infer that he or she has resigned, but the employer is under a duty to make enquiries of the employee as to his or her intentions – **Harrison v George Wimpey and Co Ltd** 1972 ITR 188, NIRC; **Oram v Initial Contract Services Ltd** EAT 1279/98.
30. A repudiatory breach of contract by an employee does not bring the contract to an end automatically. The contract will terminate only when the employer accepts the employee's breach – **London Transport Executive v Clarke** 1981 ICR 355, CA; **Zulhayir v JJ Food Service Ltd** EAT 0593/10. The Zulhayir case subsequently came before the Court of Appeal (2014 ICR D3), where Lord Justice Rimer stated that '*an employer cannot unilaterally deem an employee to have resigned when he has not; and a removal of the employee from the employer's books by a process of such deeming following a notice to the employee of an intention to do so would arguably amount to a dismissal*'.

Discussion and conclusions

Constructive dismissal

31. The Claimant was contractually entitled to a company vehicle. She argued that a 'company vehicle' is, by definition, a vehicle that is provided, maintained and insured by the employer; that the requirement to insure the vehicle herself meant it was *not* in fact a company vehicle; and that there was a breach of the express term of the contract that obliged the Respondent to provide one.
32. I do not accept that argument. The requirement for the Claimant to arrange insurance did not prevent this from being a company vehicle. The Claimant did not own or hire the vehicle herself; it was to be provided to her by the Respondent for her business and personal use. She was asked by Mr Allen to arrange the insurance, but he agreed to reimburse her and so it would be the Respondent who ultimately picked up the bill.
33. Mr Allen's request did not, in my view, breach any other express or implied term of the Claimant's contract. The written contract was silent about insurance. It is not possible to imply a term that the Respondent would insure the vehicle (as opposed to reimbursing the Claimant for an insurance policy arranged by her) on any of the established grounds, and nor was there any breach of the Respondent's implied duty to maintain trust and confidence. The Claimant was not told of any requirement to insure the vehicle until the day before she started work. However, the evidence indicated that other employees were also asked to arrange their own insurance and that this was done on the advice of the Respondent's accountant: the claimant was not being singled out. Mr Allen told the Claimant that he would reimburse her, and when she experienced difficulty

obtaining a policy at a reasonable cost, he backtracked on his original request and offered to organise the insurance for her.

34. I conclude that the Respondent's request for the Claimant to insure the vehicle did not amount to a breach of any express or implied term of the employment contract. There was no breach of the express term to provide a company vehicle, nor of any express or implied term of the contract relating to insurance, nor of the implied contractual duty to maintain trust and confidence. If the Claimant had resigned, there would therefore be no basis for claiming that she was constructively dismissed. For the reasons set out below, however, I have concluded that she did not resign.

Resignation or express dismissal?

35. The Claimant's case was that on 6 October 2021 the Respondent set a 2 pm deadline for her to phone him and, when she failed to do so, withdrew the job offer via the agency, giving rise to a dismissal.

36. The Respondent's case was that the Claimant did not report for work and failed to contact Mr Allen by 2 pm, and that she thereby voluntarily resigned. The Respondent alleged in its response form that it had suffered financial loss as a result of her resignation, but there was no attempt to quantify that loss and Mr Crumpton confirmed at the hearing that the Respondent was not bringing a contractual counterclaim.

37. I conclude that the Claimant's conduct in not reporting for work on the morning of 6 October 2021 and in then failing to contact Mr Allen after her WhatsApp message at 9.09 am, in circumstances where she had told him that she was still on the phone trying to organise insurance, was too ambiguous to amount to a resignation. The prudent course of action would have been for the Claimant to report for work and attempt to sort out the problem in person with Mr Allen, or at least to give him a call. However, she was unaware of the 2 pm deadline until it had already passed and so she did not appreciate the urgency of Mr Allen's request for her to contact him. Even if she had been in breach of contract (and I find that she was not), there is no doctrine of 'constructive resignation' or 'self-dismissal' that could assist the Respondent.

38. The WhatsApp messages between Ms Thompson and Mr Allen, and between Ms Thompson and the Claimant, indicate that Mr Allen withdrew the job offer via the recruitment agency on the afternoon of 6 October when the Claimant failed to contact him by his stated deadline of 2 pm. At that point, there had been no statement or other unambiguous indication by the Claimant that she did not intend to work for the Respondent. There appears to have been some sort of breakdown in communication, but clarification was needed as to the Claimant's intentions. Mr Allen acted prematurely and I conclude that his withdrawal of the job offer amounted to a dismissal.

Notice entitlement

39. The Claimant has no statutory entitlement to notice pay under section 86 ERA because she was employed by the Respondent for less than one month. Her only possible entitlement is under the express or implied terms of her contract or at common law.
40. If the Claimant was in fundamental breach of her employment contract by not reporting for work and/or by failing to telephone Mr Allen before the 2 pm deadline, the Respondent would be entitled to dismiss her without notice. I am satisfied that she had not committed a fundamental breach. She had informed Mr Allen of the difficulty in arranging insurance, and it was not straightforward for her to speak to him because she was on the telephone attempting to organise a policy. This was an administrative task connected with her employment, so in that sense she was carrying out work-related duties on the morning of 6 October: she had not simply gone AWOL. The sensible course of action would have been to report for work or attempt to discuss the matter with Mr Allen over the telephone, but the Claimant's failure to do so did not amount to a breach of contract, fundamental or otherwise.
41. The Claimant was subject to a three-month contractual probation period. This is clearly stated in the employment contract that she signed and returned to the Respondent. Clause 3 of the contract provided that the Respondent could terminate the contract at any time during the probation period without notice or compensation '*as and where permitted by law*'. The key question is whether clause 3 deprives the Claimant of any right to notice pay that might otherwise exist.
42. At common law, an employee is entitled to reasonable notice of termination. Clause 52 of the Claimant's contract deems 'reasonable and sufficient' notice of termination by the Respondent (I take this as a reference to the common law) to be the greater of four weeks and any minimum notice required by law. As noted above, the Claimant was not entitled to minimum statutory notice, so if clause 52 applied her notice entitlement would be four weeks.
43. These two provisions can be reconciled on the basis that clause 3 deals specifically with notice rights during the probation period, whereas clause 52 is a more general notice provision that applies thereafter. The phrase '*as and where permitted by law*' in clause 3 would prevent the Respondent from dismissing an employee during the probation period without giving statutory minimum notice, but the Claimant had no rights under section 86 ERA because she had less than one month's continuous service. The meaning of clause 3 is clear: the Respondent could dismiss the Claimant during the first month of her probation period without giving her any notice.
44. It follows that the Respondent did not breach the Claimant's employment contract by dismissing her without notice pay, and the claim for breach of contract/wrongful dismissal fails and is dismissed.

Employment Judge Leverton

Date: 10 June 2022

Judgment & reasons sent to the parties: 22 June 2022

FOR THE TRIBUNAL OFFICE