EMPLOYMENT TRIBUNALS

Claimant: Mr Alexander Davis

Respondent: Southwood Management Solutions

Held at: London South - Croydon **On:** 14th April 2022

Before: Employment Judge R Atkins

Representation:
Claimant: In person
Respondent: Mr Ollenu (Counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The claim for unfair dismissal is dismissed upon withdrawal.
2. The claim for breach of contract in relation to payment for the notice period is not upheld and is dismissed.
3. The claim for breach of contract in relation to the alleged retainer agreement is not upheld and is dismissed.
4. The respondent made an unauthorised deduction from wages by failing to pay the claimant in lieu of accrued but untaken holiday and is ordered to pay to the claimant the sum of £28.84, being the gross sum unlawfully deducted.

REASONS

Claims and Issues

5. The claimant claimed
   5.1. unfair dismissal;
   5.2. breach of contract in respect of
      5.2.1. failure to pay him full notice of termination;
      5.2.2. failure to pay sums due under an alleged Retainer Agreement; and
      5.2.3. failure to pay him in lieu of accrued but untaken holiday pay on termination of employment.

6. The claimant agreed that he did not have the requisite period of continuous employment to bring an unfair dismissal claim and agreed to withdraw this element of his claim.

7. Both parties agreed that the transcript of the phone conversation on 7th December 2020 included in the bundle was accurate.

8. The issues were agreed to be as follows:

Breach of contract notice:

8.1. What was the date of termination of employment?
8.2. What was the claimant's notice period?
8.3. Was the claimant paid for that notice period?
8.4. Did the respondent and the claimant enter into a Retainer Agreement relating to payment for the month of November?
8.5. If a sum is due, is it paid gross or net?

Holiday pay

8.6. What holiday pay is due to the claimant?
8.7. Should it be paid net or gross?

Procedure, documents and evidence heard

9. There was a small bundle of documents. There were written witness statements for the claimant and Mr. Okoro, director of the respondent. The claimant was the only witness for himself. Mr. Okoro gave evidence for the respondent.

Fact findings

10. The claimant was employed by the respondent from 2nd November 2020 until the date of termination as a junior business analyst.

11. The claimant had a written statement of terms and conditions of employment.

12. Relevant terms were that

12.1. The claimant joined the respondent on a three-month probationary period.
12.2. The claimant was required to give one month's notice when terminating his employment with the company.
12.3. The claimant was entitled to receive the following notice periods when his employment was terminated by the company.
12.3.1. under one month service - one day
12.3.2. one month, but less than five years' service- one month.
12.4. The same notice periods applied to the claimant's employment both during and following the probation.

12.5. On the termination of his employment, the claimant had to return all company property, which was in his possession including, but not limited to, keys and equipment.

12.6. There was no requirement for notice of termination to be given in writing

Law

13. An employer will be in breach of contract if they terminate an employee's contract without the contractual notice to which the employee is entitled, unless the employee has committed a fundamental breach of contract which would entitle the employer to dismiss without notice.

14. The aim of damages for breach of contract is to put the claimant into the position they would have been in had the contract been performed in accordance with its terms.

15. Section 13(9) of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of a deduction. An employee has the right to complain to an Employment Tribunal for an unauthorised deduction from wages pursuant to section 23 ERA. The definition of "wages" in section 27 includes holiday pay.

Findings of Fact and Conclusions

<u>Breach of contract – Retainer Agreement</u>

16. The claimant commenced work with the respondent on 2 November 2020

17. The claimant attended the respondent's office on 2nd November 2020. The respondent discussed the lockdown position with all employees present on that day. The respondent announced that the claimant and two other junior employees would be placed on furlough as it would not be possible for them to carry on working during lockdown.

18. The claimant informed the respondent that he was ineligible for furlough as he had not been on the payroll of the respondent on the qualifying date. The respondent confirmed this to be correct.

19. The claimant and the respondent discussed options. Mr. Okoro said would try to find alternative work for the claimant within the respondent's business.

20. It is agreed that by both parties that there was some discussion about a retainer agreement, pursuant to which the respondent would pay the claimant a sum of money in order to retain the services of the claimant

during the period of lockdown. There is not agreement as to who initially raised the possibility of a retainer agreement; both parties state that the idea of a retainer agreement was raised by the other party.

21. The claimant's evidence is that figures for a possible retainer payment were discussed on 2 November and written down on pieces of paper. He did not keep the paper. His evidence is that a final figure was agreed by the parties and that he asked Mr. Okoro to confirm this in writing but was informed by Mr. Okoro that this would not be necessary and that he should just confirm the agreed figure of £1150 in a follow-up email. The claimant's follow-up email is in the bundle at page 35.

22. The respondent's evidence is that the parties did have a discussion but no final figure was reached and the matter was left open-ended. His evidence was that a retainer made no business sense as the claimant was a new untested employee in a junior post and the business had no incentive therefore to pay money to retain his services. As the proposed client project had been put on hold due to lockdown, there was no work the claimant could do in the foreseeable future. His junior status also meant that he required supervision, which was not possible during lockdown.

23. Both parties agree that Mr. Okoro said he did not believe in paying people to do nothing.

24. I accept Mr. Okoro's evidence that given there was no work for the claimant to do, he made it clear to the claimant that it made no business sense to pay him to do nothing. I find that Mr. Okorrro did enter into discussions regarding ways the respondent could help the claimant. I find that although figures for a retainer were suggested by the claimant, these were offers by the claimant which were not accepted by the respondent and therefore no oral agreement as to a retainer agreement was made. I find that Mr. Okoro did ask the claimant to put his request for a retainer payment in writing. However, given that no oral agreement was reached during the discussions on 2nd November, I find that the claimant's email follow-up, sent at 3.38 pm on 2 November, was a further offer of a retainer agreement which the respondent was free to accept or reject.

25. Mr. Okoro sent an email to the claimant at 19.43 on 2 November in which he told the claimant to come into the office on 4 November. He did not refer to the retainer agreement in that email.

26. The claimant attended the offices of the respondent as requested on 4 November 2020

27. The subject of the retainer agreement was discussed again. It is agreed by the parties that Mr. Okoro repeated his comments that he did not believe in paying people to do nothing.

28. I find that the offer of a retainer agreement contained in the claimant's email of 2nd November was therefore not accepted by the respondent and was in fact rejected by the respondent orally on 4th November 2022.

29. I therefore conclude that there was no Retainer agreement between the respondent and the claimant either in variation of the original contract or as a new contract between the parties.

30. The claim for breach of a retainer agreement therefore fails and is dismissed.

Termination of Employment

31. The claimant gave evidence that when he attended the respondent's offices on 4th November, he was told that although the project for which he had been recruited had been pushed back until January 2021, his job was still in effect and he should touch base in a month's time to discuss future projects.

32. He said that he had not taken his laptop home on Monday 2 November and had left it in the office on Wednesday 4 November when he left as had both the other employees who had been placed on furlough. He said that it was not uncommon at his previous employer to leave laptops in the office between projects.

33. He could not recall whether Mr Okoro had requested that he leave the laptop by or whether he had asked whether he should do so

34. He gave evidence that he handed his keys to Mr Okoro on leaving the building but could not recall whether he had offered this or been asked to return them. In any event he felt it reasonable to hand back the keys as the respondent was in the process of moving offices.

35. Mr Okoro gave evidence that he told the respondent that his contract was terminated and that his services were no longer required due to the lockdown being imposed on 5th November 2020. He explained that this was due to the respondent's stakeholders themselves being on furlough and anyone who had the experience necessary to supervise the claimant also being on furlough. He investigated possibilities for alternative employment but explained that the claimant did not have the skillset to assume another database-led role. He explained to the claimant that there was no work for him to do and that he did not believe in paying people to do nothing. He suggested to the claimant that they touch base in January 2021and would consider re-employing him at some point in the future.

36. Mr Okoro said the claimant had taken his laptop home on Monday 2 November, worked from home on Tuesday 3 November and returned the laptop to the office on Wednesday 4 November.

37. Mr Okoro gave evidence that he requested that the claimant return his laptop and keys in accordance with the service contract.

38. Mr Okoro confirmed that an office move was proposed but said that as at 4 November, it was not imminent and in fact was not finalised until March 2022.

39. Mr. Okoro's evidence was that the 2 other employees being placed on furlough left the offices on 2 November taking their keys and laptops home with them.

40. I find that the two junior employees placed on furlough and the claimant were permitted to take their laptops home when they left the premises on 2 November. As director of the respondent, Mr Okoro was in a better position than the claimant to know which employees were in possession of office laptops and who had been asked to leave them in the office. As a new employee on his first day, it would be more difficult for the claimant to reliably ascertain that information. Mr. Okoro was also in a better position to know who whether the other 2 junior employees had retained their laptops at home during the following period of lockdown.

41. I find that the claimant was permitted to take his laptop home on 2 November and was asked to hand back his laptop on 4 November. Mr Okoro's evidence on this issue was clearer and more certain than that of the claimant.

42. On 2 November it was clear that the proposed project had been postponed and there was no work for junior employees to do. If it were office policy to hand back office equipment between projects, the claimant and the two junior employees would have been asked to leave their laptops at the premises on that date. I find that permitting the claimant to take home his laptop on 2 November and requiring the claimant to leave his laptop on 4 November was consistent with termination of the contract.

43. I find that, although there was an office move in contemplation, this was ongoing and not imminent and therefore would not require the immediate return of keys from employees.

44. I therefore find that the return of the keys were consistent with termination of the claimant's employment.

45. Mr. Okoro gave evidence that he escorted the claimant from the premises. The claimant agreed that he and Mr. Okoro left the building together, but this was just because Mr. Okoro was leaving at the same time for a medical appointment. The claimant said that the parties parted amicably.

46. I find that Mr. Okoro and the claimant were the only 2 people in the office on 4 November, and as the claimant had handed back his keys, it was necessary for them to leave together so that Mr Okoro could lock the premises. I do not find that the claimant was formally escorted from the premises.

47. Mr. Okoro gave evidence that he went to the medical appointment, then returned to the offices, typed and printed a termination letter and sent it by post to the claimant later that day. There was no proof of postage of the letter. I note that all previous correspondence between the parties has been by way of email. There was no email confirmation of the termination letter.

48. The claimant gave evidence that he had not received a letter of termination.

49. I note that there is no requirement in the service contract for dismissal to be in writing.

50. Whether a dismissal has taken place is an objective test. It is viewed not from the point of view of what the parties consider the words and or conduct of the employer to have meant but what it did, objectively assessed mean.

51. Mr Okoro was very clear and consistent in his evidence as to what he had said and what he had explained to the claimant as regards the lack of work for him to do, the lack of suitable alternative employment, his reluctance to pay the claimant to do nothing during lockdown, the termination of his employment and the return of office property.

52. Both parties accepted that Mr Okoro had explained to the claimant that there was no work for him to do and that he would not pay him to do nothing during lockdown.

53. The claimant was not sure as to what had been said and by whom as regards the return of the equipment.

54. Mr Okoro was clear and consistent in his evidence. I find that he used sufficiently clear words to terminate the claimant's contract of employment on 4th November 2022. I find that the offer to touch base was made with a view to re-employment rather than with a view to reviewing the terms of the claimant's continuing employment.

55. If I am wrong on that issue, I find that in the context of the circumstances prevailing at the time, the explanations given to the claimant regarding the lack of work or suitable alternative employment, the repeated assertions by the respondent that he would not pay the claimant to do nothing during furlough, and the requirement for him to return office equipment in accordance with the termination provisions set out in the contract, the claimant ought reasonably to have known that his employment was being terminated.

56. As written notice of termination is not required under the terms of the contract of employment, oral termination is sufficient to terminate the contract. I find that the claimant was dismissed by Mr Okoro orally on 4th November 2020. He is therefore entitled to one day's notice under the terms of his contract of employment. Having worked on 2 November, 3 November and half of 4th November 2020, he was therefore entitled in total to 3.5 days' pay. The sum of £338.53 paid to the claimant by the respondent, albeit regrettably late, satisfies the amount due in respect of unpaid wages and notice.

57. As I have found that dismissal occurred orally on 4th November 2020, I have given limited weight to subsequent events, in particular the arguments raised in relation to whether the letter of termination was sent

or received, and why the letter of termination was not mentioned by Mr Okoro during the telephone discussion on 7th December 2020.

Holiday pay

58. The parties agreed at the outset that, should it be found that termination occurred on 4th November, the claimant was entitled to be paid in lieu of the 0.3 days leave accrued in the leave year.

59. The respondent has not made any payment for holiday pay to the claimant. I conclude that the respondent made an unauthorised deduction from wages by not paying him in lieu of this leave.

60. I calculate the amount of payment on a gross basis, but the respondent is entitled to make any deductions which are due for tax and national insurance contributions before payment is made to the claimant.

61. The claimant's gross daily pay was £96.15. The amount due was £28.84.

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Employment Judge Atkins
Date: 27 June 2022

Sent to the parties on
Date: 19 August 2022