



EMPLOYMENT TRIBUNALS

Claimant: Mr Richard Finch
Respondent: Rutland Biodynamics Ltd
Heard at: Nottingham by CVP
On: 3 March 2022 & 23 June 2022
Before: Employment Judge Victoria Butler (sitting alone)

Representation

Claimant: Mr D Mason, Counsel
Respondent: Mr P Chenery, Managing Director

JUDGMENT having been sent to the parties on 27 June 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

JUDGMENT

The Claimant's claim of wrongful dismissal fails and is dismissed.

REASONS

Background

1. The claimant presented his claim to the Tribunal on 17 June 2021. He claims wrongful dismissal after his summary dismissal by the Respondent for gross misconduct with effect from 26 March 2021.

The issues

2. Was the Claimant wrongfully dismissed and, therefore, entitled to notice pay?

The hearing

3. I heard evidence from the Claimant and Mr Paul Chenery, Director of the Respondent.
4. I was provided with witness statements and two separate bundles in advance of the hearing. Both bundles were equally confusing as they were not in chronological order but, given that the case was not document heavy, it did not prove too problematic. For ease, I compiled my own bundle comprising all the relevant documents and placed them in chronological order. Consequently, where I quote from documents, I do not refer to a page number but describe the documents and the parties will be aware which documents they are.
5. I also had the benefit of written submissions from both parties.
6. During the first day of the hearing, the Claimant seemingly asked his representative, Mr Vincent Hislop, for assistance whilst under cross-examination.
7. On day two of the hearing, Mr Hislop provided a witness statement confirming that he was not in the room when the Claimant was being cross-examined and had not assisted him. Mr Chenery did not challenge the evidence and, therefore, no further determination in this regard was required.

The evidence

8. On balance, I preferred the evidence of Mr Chenery whose oral evidence was consistent with his written statement and accorded with the documents in the bundle.
9. I found the Claimant's evidence to be evasive at times and he would seek to avoid answering questions which potentially harmed his case. I also found his defence in contacting Glenpatrick lacking any credibility and I deal with this more below.

The facts

Background

10. The Respondent is a company with circa twenty employees which specialises in the production of products from organic herbs. It is highly reputable in a small, niche industry within which all companies know each other.
11. All employees are issued with a staff handbook which sets out the disciplinary procedure. The procedure is clear that acting in any manner which could bring the Company into disrepute amounts to gross misconduct.
12. The Claimant was previously employed by Ransom Naturals Limited ("RNL") which is a competitor of the Respondent. The Claimant held a senior management role there alongside his colleague, Ms Bhatarah.

13. Both the Claimant and Ms Bhatarah felt that their efforts in RNL were not being rewarded and, further, a promise of shares had not materialised. Accordingly, they decided to direct their efforts elsewhere, namely at the Respondent.
14. The Claimant had known the Respondent's Managing Director, Mr Chenery for some time. Accordingly, he and Ms Bhatarah approached him to discuss acquiring the Respondent and heads of agreement were agreed between the parties.
15. However, during their negotiations, the Claimant used RNL's confidential information in his presentations to Mr Chenery.

The High Court proceedings

16. The Claimant and Ms Bhatarah resigned from RNL on 11 January 2019. RNL subsequently became aware that the Claimant had misused its confidential information and issued proceedings in the High Court against the Claimant, Ms Bhatarah, the Respondent and Mr Chenery personally.
17. The proceedings caused everyone distress, but more particularly Mr Chenery who had built the Respondent from scratch. The High Court proceedings were ultimately settled, and a Tomlin Order ("the Order") agreed. The relevant section of the Order for the purposes of this litigation is:

*"until 1 March 2022, the First Defendant **shall not** directly or indirectly on his own behalf or on behalf or in conjunction with any firm, company or person (including for the avoidance of doubt Paul Chenery, East West Naturals Limited and/or Rutland Biodynamics Limited) have any business dealings involving the supply of any product containing Elderflower (or any extracts thereof) to:*

- a. PepsiCo/Konings*
- b. Fevertree Limited*
- c. Glenpatrick.*

18. The Claimant fully understood the terms of the Order.

The Claimant's employment with the Respondent

19. The Claimant commenced employment with the Respondent on 3 November 2019 as Sales and General Director.
20. To mitigate the risk of a breach of the Order, Mr Chenery had numerous conversations with the Claimant to ensure that its terms were adhered to and required the Claimant copy him in on all contact with customers.
21. Mr Chenery also asked the Claimant to allow him access to his emails, a practice

which was not unusual at the Respondent given its size, but the Claimant refused.

22. The Claimant was also instructed to maintain a daily, weekly and monthly list of all contacts. The Claimant's contact lists did not include Glenpatrick.
23. Mr Chenery was so concerned to protect his business that he produced a new brochure to send out to customers which did not include reference to elderflower or prices. A separate catalogue with prices was produced which could be sent in addition to the brochure as appropriate, but which would certainly not be sent to the prohibited businesses. It was on this basis that the Claimant and Mr Chenery wrote to Fevertree without any difficulty.

Mr Chenery's e-mail to the Claimant dated 5 October 2020

24. On or around 19 September 2020, Mr Chenery had a conversation with the Claimant in which he had highlighted a number of concerns which were recorded in a subsequent email dated 5 October 2020.
25. Mr Chenery said: *"our discussion on 19th highlighted a number of issues and I think that a record of what we talked about should be set down and written out now"*.
26. Mr Chenery raised the Claimant's use of his job title he said, *"You're not a Board Director and it falls to me to point out that you must not hold yourself out to be a Board Director. Titles are of little interest to me unless and except they create a false impression or could land us in further legal difficulties. I don't think that you fully appreciate the factors and would suggest that you ought to read a little background illustrating this in a link as you can see it is exactly the sort of thing that can cause friction with the Home Office, The MHRA, Customs and Excise, VAT and so on by the very tenuous cooperation of whom our several licences hang"*.
27. Mr Chenery went on to say, *"I suggest that it would be more accurate that you record Sales or Commercial Director. I must therefore ask you to change your email and any other signatures to Sales Director at least until we can agree on some other appropriate title"*.

The Claimant's contact with Glenpatrick

28. The Claimant refrained from contacting Glenpatrick for two years, appreciating that any such contact risked breaching the Order.
29. However, on 11 February 2021, the Claimant made pro-active contact with Glenpatrick with a view to speaking to its Managing Director, Mr Hynes, about potential business dealings, despite the restrictions in the Order still being in force and without Mr Chenery's knowledge.
30. Mr Hinds was otherwise engaged so the Claimant spoke to Mr Lyness, Supply Chain Manager. The Claimant followed up that conversation by way of an email attaching the brochure and catalogue, which contained reference to elderflower

products, in the following terms:

“Hi Sean, great to speak with you earlier today it brought back a few nice memories. As promised, please see attached catalogue and Company overview. We grow our herbs on a beautiful farm in Rutland, quite majestic throughout the growing season more than 70m different herbs. Let’s keep in touch and if there is an opportunity with you, we would love to have a crack at it. Ping me back to show this got through”.

31. Later that day, the Claimant also managed to speak with Mr Hynes and followed up with an e-mail, attaching the brochure and catalogue (including reference to elderflower products) in the following terms:

“As promised please see attached standard catalogue and Company overview. I’ll also try and pull together a number of tinctures I think would work well in beverage applications..... Please ping me back just to prove this managed to get through. We’d love to have a crack at working with you guys in the future”

32. On 18 February 2020, the Claimant chased Mr Lyness asking: *Hi Sean did you receive my email?* He replied saying, *“Yes I did receive your email and I passed the brochure on to Marie to see if there is anything on your product list of interest”.*

33. The Claimant referred to himself on both e-mails as ‘Director’. He did not inform Mr Chenery of the telephone conversations and subsequent follow-up e-mails.

The letter from RNL’s solicitors

34. On 10 March 2021 Mr Chenery received a letter from RNL’s solicitors alleging that the Claimant had approached Glenpatrick in relation to elderflower products. The letter said:

“This letter is urgent and of high importance. We urge that you seek legal advice on its contentsthe Tomlin Order is subject to a penal notice.... Our client is aware that Mr Finch has approached Glenpatrick in relation to the sale of Rutland’s products including in relation to Elderflower. As you are fully aware business dealings in relation to Elderflower are expressly prohibited pursuant to paragraph 3 schedule (a) of the Tomlin Order. In light of the terms of the Tomlin Order we trust that you will immediately instruct Mr Finch in writing to comply with the terms of the Tomlin Order. If Mr Finch persists in breaching the Tomlin Order or if our client finds further evidence of other wrongdoing that it is not currently aware of it will not hesitate to issue an application in the High Court to enforce the Tomlin Order against Mr Finch. In addition, you are now on notice of Mr Finch’s conduct and therefore any application will include a claim against Rutland Biodynamics Limited for inducement of such breaches”.

35. The letter explained that if the Respondent/Mr Chenery was in breach of the Order or did anything to assist any person breach it, they *“may be held in contempt of court and may be imprisoned, fined or have their assets seized”.*

36. In immediate response Mr Chenery took advice, conscious that any further litigation risked causing the Respondent severe financial and reputational damage. Following that advice, he suspended the Claimant pending an investigation and disciplinary hearing and e-mailed him as follows:

“Following receipt of a serious allegation of Contempt of Court this evening this could possibly also constitute gross misconduct. It is with great regret that I have no option other than but to suspend you from your duties on full pay pending an investigation.”

37. On 16 March 2021, RNL’s solicitors sent a further letter providing further information about the alleged breach quoting from the abovementioned e-mails and commenting:

“You state that Mr Finch is suspended pending a disciplinary investigation. Our client is pleased to see that you appear to be taking this matter seriously. Given Mr Finch’s previous utter disregard for the obligation that he owed to our client, our client is taking this matter extremely seriously and we trust that you will do the same.”

38. Mr Chenery was asked to give an update on steps taken in relation to Mr Finch by no later than 4.00pm on 19 March.

39. On 17 March 2021, Mr Chenery e-mailed the Claimant confirming that the investigation was complete, and that he was required to attend a disciplinary hearing on 25 March 2021. The allegation against the Claimant was confirmed as follows:

“The allegation against you is that you acted in a manner which could bring the Company into disrepute. Your actions have brought the Company into disrepute.

The grounds for this are: Mishcon de Reya has written threatening to join the Company (and PC personally) in an alleged breach of the High Court Order (the Tomlin Order). The RBD disciplinary hearing will not concern itself with the merits of Mishcon’s allegations or case, but only with the issue as to whether your behaviour and activity in contacting Glenpatrick was in a manner likely to bring the Company into disrepute.”

40. Mr Chenery set out the matters to be considered at the hearing and explained:

“10. The foregoing also suggest that you must have weighed very carefully the risk of Ransom in the High Courts taking the not unreasonable view that all of the above together with the offer in the catalogue was a clear attempt to take soundings of Glenpatrick and this to get round the Tomlin Order one year in advance of its expiry. There is no other explanation for your failure to discuss it either before or after with RBD. It appeared from the evidence that you

calculated that you could get away with it. If you failed to weigh the risk very carefully then your behaviour was nonetheless negligent in bringing the Company into disrepute. Whether the forwarding of a catalogue was or was not in itself a breach of the Tomlin Order the entirely predictable result of your behaviour is an accusation against the Company of breaching the Tomlin Order and it is that action which has brought the Company into disrepute. Your actions have put the Company and myself in the position of having to reply to a claim of action for breach in The High Court.

41. On 23 March 2021, Mr Chenery received a further letter from RNL's solicitors stating:

"We understand that Mr Finch is not a statutory Director of Rutland. However, Mr Finch's email footer in his email to Glenpatrick on 11 February 2021 stated Richard Finch, Director. Therefore, Mr Finch was holding himself out as a Director of the Company and therefore has apparent and/or ostensible authority to bind Rutland.

We note your assurance that Rutland will abide by the terms of the Tomlin Order to the extent that Mr Finch remains a Rutland employee, our client fully expects Rutland to ensure that Mr Finch does the same. Furthermore, our client expects that all information regarding Elderflower be removed from any marketing material sent to PepsiCo/Konings, Fevertree Limited and/or Glenpatrick until the expiry of the relevant restrictions in the Tomlin Order. To be clear if our client believes that Rutland and/or Mr Finch further breach the terms of the Tomlin Order our client will issue an application in the High Court to enforce its rights."

42. On 24 March 2021, Mr Chenery wrote to the Claimant again with two further matters to be discussed at the disciplinary hearing, namely the fact that the Claimant had been holding himself out as a Director of the Respondent and, further, that the Claimant had forwarded Mr Chenery's email dated 5 October 2020 to two individuals outside of the Respondent.

The disciplinary hearing

43. The disciplinary hearing took place as scheduled on 25 March 2021. At the outset Mr Chenery confirmed that the allegations against the Claimant were that *"he might have brought the Company into disrepute by potentially breaking a Tomlin Agreement not to contact a customer offering to sell elderflower"*; that the breach was *"either wilful or negligent"*; and, that the Claimant had misrepresented himself as a Director of the Company.
44. The Claimant was permitted to call witnesses at the hearing and was given full opportunity to state his case
45. Following the hearing, Mr Chenery undertook a period of deliberation and concluded that the Claimant's actions amounted to gross misconduct. He confirmed the outcome in a letter dated 26 March 2021 as follows:

“By your actions you allowed the Company potentially to be liable for a breach of a Tomlin Agreement by way of offering to sell from a list including elderflower to a customer which was forbidden for a period of 3 years. It is irrelevant as to whether this was wilful or merely stupid. However, on the balance of probabilities I believe that you deliberately sought to hide your contact with Glenpatrick from me. This is evidenced by the absence of Glenpatrick from your contact sheet which is regularly updated.....it is also deeply suspicious that you did not tell me, seek agreement or ask my permission to contact Glenpatrick, particularly as you admitted you knew how sensitive such contact would be due to the enmity of your former employers and their inclination to litigate on any possible breach of the Tomlin Agreement..... whether or not the Tomlin Agreement was actually breached is not relevant..... On the other issue of misrepresenting yourself as a director, this follows the direct clear and plain instruction verbally from me and also in writing together with literature on why this must not be done..... the only realistic explanation, given that the misrepresentation never occurred internally but only to selected important external business customers, is that you were merely seeking to raise your status with such customers in a misleading way. This again has led directly to the Company being reported to external solicitors and having to face an accusation of having an employee acting fraudulently. This cannot but bring the Company into disrepute.....”

46. Mr Chenery confirmed that the Claimant was summarily dismissed with an effective date of termination of 26 March 2021.

The law

47. A claim for wrongful dismissal requires me to consider whether the Claimant committed the acts referred to and whether such acts amounted to a fundamental breach of contract.

48. I have had regard to *Rawson v Robert Norman Associates Limited* UKEAT /0199/13/RN, as referred to in Mr Mason’s submissions, in which Justice Langstaff said:

“Many claims for wrongful dismissal or constructive dismissal involve an assertion that it was the employee and not the employer who in the circumstances was in breach of contract. In such a case what is relevant is not what the employer thought happened however reasonable that might be. It is what actually happened. A Tribunal needs to know and say why it takes the view that it does that the conduct happened as alleged or did not. Accordingly, it is for the Respondent to prove on a balance of probabilities that the conduct alleged occurred”.

Conclusions

49. I am mindful that the Respondent is a small, but reputable, company operating in a

small, niche industry within which all companies know each other.

50. It is common ground that following the Claimant's misuse of RNL's confidential information, the parties entered into the Order which prohibited the Respondent, Mr Chenery and the Claimant from having any business dealings with Glenpatrick involving the supply of any product containing elderflower.
51. The Claimant fully understood the prohibitions contained within the Order and Mr Chenery put in place stringent measures to ensure there was no breach of it, intentional or otherwise. Any further litigation placed the Respondent at risk of severe financial and reputational damage.
52. I have had regard to the Claimant's emails to Mr Linus and Mr Hinds in which he attached the Respondent's catalogue containing elderflower products. He said to Mr Linus: *"if there's an opportunity with you we would love to have a crack at it"*. The same sentiment was expressed to Mr Hinds.
53. The Claimant argued that this was merely an expression of interest in future dealings with Glenpatrick falling outside the terms of the Order. He also argued that although the catalogue contained elderflower products, the Respondent did not have capacity to produce the amounts that Glenpatrick might require but, elderflower was not a product that it would purchase in any event. However, this is not the point within the context of the Order and appears to be an attempt by the Claimant to retrospectively mitigate his actions.
54. Whilst it is not my role to determine whether there was an actual breach, it is abundantly clear that the Claimant contacted Glenpatrick with a catalogue containing elderflower products with a view to obtaining its business. On the face of it this amounts to a business dealing, which was certainly the view taken by RNL.
55. Even if it did not amount to a business dealing within the terms of the Order, the Claimant's contact with Glenpatrick triggered the threat of High Court proceedings by RNL. I am satisfied that this was not an empty threat given that RNL had previously litigated the matter and it was entirely reasonable for Mr Chenery to treat the matter with utmost seriousness.
56. The Claimant deliberately sought to hide his contact with Glenpatrick from Mr Chenery, despite Mr Chenery's instructions that he be involved in all such matters. Had he engaged with Mr Chenery, I am satisfied that no contact would have been made with Glenpatrick at all or, if there was, certainly without reference to elderflower products.
57. During the investigation it also became apparent that the Claimant had misrepresented himself as a statutory director and deliberately kept Glenpatrick on his contact list without disclosing the same to Mr Chenery. This, amongst other matters, added weight to Mr Chenery's belief that the Claimant was being deliberately deceitful. I agree with his analysis.

58. Given the background litigation; the measures put in place by Mr Chenery to avoid any breach of the Order; and the Claimant's full awareness of the terms of the Order and RNL's willingness to litigate, I am satisfied that the Claimant's actions in contacting Glenpatrick with a catalogue containing elderflower products and deliberately hiding such contact from Mr Chenery amounted to gross misconduct.

59. Furthermore, the Respondent's disciplinary procedure provides acting in any manner which *could* bring the Company into disrepute amounts to an act of gross misconduct. The Claimant's actions triggered the threat of legal proceedings which, if they materialised, could not only have caused severe financial damage to the Respondent but also reputational damage. It certainly caused reputational damage in the eyes of RNL, and I am also satisfied that his actions could have brought the Respondent into disrepute in the wider industry by having to defend an allegation that it had breached its legal obligations. This is more so given that the small size of the industry. Accordingly, I am satisfied that the Claimant's actions amounted to gross misconduct more generally, and in accordance with the Respondent's disciplinary rules.

60. The Claimant's claim for wrongful dismissal fails and is dismissed.

Employment Judge Victoria Butler

Date: 14 September 2022

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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