EMPLOYMENT TRIBUNALS

Claimant: **Mr A Osvald**

Respondent: **Holden and Co LLP**

Heard at: **London South Hearing Centre**

On: **26 October 2022**

Before: **Employment Judge McLaren**

Representation

Claimant: In Person

Respondent: Mr. Holden, Solicitor

JUDGMENT

The claimant's complaint that there was a breach of contract is well founded. This means the claim succeeds.

REASONS

Final Hearing

1. This was a remote hearing by video conference call. A face-to-face hearing was not held because it was not practicable. The parties did not object.
2. I confirmed that I have been provided with two separate bundles, one from each party. The claimant's bundle was 311 pages, the respondent's bundle was 119 pages.
3. I heard evidence from the claimant on his own behalf, and from Mr Holden on behalf of the respondent.

Background

4. The claimant filed an ET1 on 09/02/22 in which he brings a claim for breach of contract. This is resisted by the respondent as it says there was no contract between the parties.

The issues

5. I agreed with the parties at the outset that the issues to be determined were these

(a) was there a contract between the parties. The respondent says there was no contract, the claimant relies on a verbal agreement as evidenced by email correspondence which he says was concluded on 15 November.

(b) If there was a contract,

i. was the respondent's action in varying the oral terms by sending out different written terms a breach of the implied term of trust and confidence sufficient to allow the claimant to treat the oral contract as at and end and resign?

ii. did the claimant waive any such breach by delay in resigning.

iii. If there was a breach of any contract, how much should the claimant be awarded as damages?

6. While the hearing was listed to deal with both liability and remedy, there was insufficient time for this. I asked parties whether they would be content to send in written submissions in relation to remedy before I had made any liability decision. The claimant did not wish to do so, and I accepted his preference was for me to make a liability finding and advise the parties of this and then to address to remedy at a further hearing if required. Nonetheless I have set out the relevant law as it relates to remedy to assist the parties.

Findings of Fact

7. The claimant undertook a law degree which he successfully completed in 2013. He did not pursue a legal career at that time due to a need for flexibility to carry out childcare for his children. His family arrangements are such that he is the primary child carer.

8. At some point he obtained a role with Royal Mail, and he was carrying this out prior to the events that have led to this tribunal. He explained that this was a well-paid flexible role which he found rewarding, both socially with colleagues, but also because he was able to provide support to individuals during Covid, when he was often the only person they saw. In addition to a good salary, he explained that he was entitled to a generous share option package.

9. The bundles contained an exchange of emails from the 8 October 2021. They show that the claimant sent in his CV together with a cover email identifying the areas of law that predominantly interested him. Mr Holden responded to explain that the practice was a legal aid high street solicitor, but they could offer the chance to do probate work and possibly some conveyancing or litigation. Mr Holden suggested that if this was of any interest to the claimant, they try to meet.

10. On the same day, 8 October, the claimant responded to Mr Holden and said that he would love to be afforded the chance to work within the area of civil litigation. He explained that his aim was to complete the training contract and qualify as a solicitor.

11. Pressure of work meant that Mr Holden was not able to meet with the claimant until 5:30 PM on Saturday, 13 November. The two individuals met on that day and the bundles contained handwritten notes prepared by Mr Holden at the time. While Mr Holden's witness statement said that he recollected he had a number of brief meetings with the claimant, he accepted that in fact this was their first meeting. I find that this meeting and the email exchanges I refer to here amount to the totality of the contact between Mr Holden and the claimant.

Meeting on 13 November

12. The claimant gave evidence that he had a clear recollection of the meeting, Mr Holden's recollection was less certain. He did make some notes at the time, and I was referred to these. The handwritten notes confirm that a salary was mentioned, in the maximum set out, the need for two references was discussed, and references were made to being a trainee solicitor. The notes also show that 25 hours was noted. Mr Holden was clear that he was told that the claimant currently worked reduced hours and that the discussion they were having about the claimant as a trainee solicitor was also to be on reduced hours.

13. Both agree that the meeting was to discuss a role as trainee solicitor, that would be on reduced hours and a salary was outlined. The parties disagree that the claimant told Mr Holden that he had a well-paid flexible job and Mr Holden could not recall being told that the claimant needed to collect a child from school. Mr Holden did not recall a discussion as to paid parking or office location at that meeting.

14. I find that the claimant did make Mr Holden aware of his then current job and its flexibility. I find this because the notes say, "been PO five years for 29 hours". This contemporaneous note accords with the claimant's recollection. On the balance of probabilities, I also find that office location and child pick up arrangements were discussed at this meeting. These were hugely important to the claimant, and I find it more likely than not that he explained this at the time. I prefer his recollection to that of

Mr Holden whose written witness statement about what had occurred was on part at odds with the terms of the later emails, for example, as to whether he had met the claimant before 13 November.

15. For that reason, I also accept the claimant's evidence that at this initial meeting Mr Holden had offered to pay for a parking space close to the Hastings office so that the claimant could make the school runs, had offered a pension scheme and promised to cover training contract expenses. I also find that at this meeting the parties agreed the job role, the maximum full-time salary, reduced hours of no more than 25, a start date in the New Year and the office location. I find that Mr Holden agreed these matters with the claimant in full knowledge and understanding of his flexible role with Royal Mail and his need for this flexibility to continue.

16. While Mr Holden characterised this as an exploratory meeting, based on my findings as to what the parties agreed I do not accept that. I find that this conversation set out the parameters for a working relationship which the respondent then took forward in subsequent email.

Course of correspondence following the meeting

17. Following this meeting Mr Holden sent the claimant an email dated 15 November 2021 at 11.05 AM. It was set out as a follow-up to the meeting on Saturday when it notes that the two discussed the possibility of the claimant joining the firm as a trainee solicitor. Neither this email nor any of the subsequent correspondence is marked "subject to contract". No reference express or implied is made to any written agreement being required. Instead, this email specifies that the claimant was to undertake four actions and that he, Mr Holden, would await hearing from the claimant.

18. These are the only four actions the claimant is required to take. There is no other reference to conditionality. The email does not specify that, for example Mr Holden needs to make further enquiries himself as to how to organise a training contract. Mr Holden suggested in his oral evidence that this was a clear precondition of any employment arrangement, but he accepted that he took no steps to carry out this research until after the date on which he would have expected the claimant to have signed the written document and to have started work. I find that, even if it was in his mind, he did not explain this to the claimant, and it cannot have been a conditionality when he himself took no steps to address that condition prior to the point when he would have accepted the relationship started.

19. The four actions the claimant had to undertake were to find out from the law society about the impact a gap of six years between signing a training contract and the date of the claimant's LLP might have on the training contract procedure, to discuss with his wife the number of hours he would be able to devote weekly and to discuss the

annual salary and to provide referees.

20. The email confirmed that the annual full-time salary would be £22,000 but that the claimant's salary would be a proportion of that, depending on how many hours he was able to work. This had already been discussed at the meeting. The email also notes that they had agreed a start date in the New Year. It concluded that Mr Holden would await hearing from the claimant further. I find that this email confirms some of the points that had already been agreed in the first meeting.

21. The claimant responded at 13.32 the same day, 15 November. He provided the necessary information from the Law Society. He made reference to the cost of the exams at £3980 and said that he believed Mr Holden had said the firm would cover those costs. I find that this had been discussed at initial meeting since there is no other reason for the claimant to provide this cost to Mr Holden and that this was therefore already part of the agreement between the two.

22. The response email specified 28 hours per week, Mondays 9 AM to 6 PM on Tuesday to Fridays 9:30 AM to 2:30 PM. The claimant confirmed that the correct amount of remuneration would be £17,603.04 p. The claimant provided two references. The claimant set out his proposed start date as Monday, 17 January 2022 and noted that he had to inform his current employer of his intention to leave that week.

23. Mr Holden responded to that email also on 15th November at 15.05. He wrote "I confirm that all is in order, although I will not be taking up your references until after you have started but I'm sure your references will be fine". Mr Holden confirmed that it was the respondent's practice not to take up references until after an individual had started employment with it. I find therefore that the formation of the relationship with the claimant was not conditional upon satisfactory references. His ongoing relationship could have been terminated if they were not satisfactory, but it was addressed that way round. Mr Holden confirmed that the claimant would be provided with a parking space and agreed the amount of starting remuneration. The email concluded at the claimant was to feel free to drop into the firm between now and his start date.

24. At 15.13 on 15 November the claimant responded to Mr Holden thanking him for the email and the opportunity to join the firm. He confirmed that he was giving his notice at his place that week and would pop into the office to see if there were any textbooks you could borrow to have a read before he joined the firm. The claimant considers that this was his acceptance of an offer made to him by the respondent.

25. It was common ground that by 15 November the respondent had agreed a starting salary, a role, that of trainee solicitor, and a start date. I have also found that by this date the parties had agreed an office location, covering of expenses for law society exams, a parking space, and pension contributions. There is no other reference in the

correspondence to the precise hours the claimant was to work until these are set out in the written contract. I find therefore that the respondent had also agreed the precise working pattern with the claimant as part of this correspondence and had agreed that by 15 November.

26. In considering the course of correspondence I find that the claimant was offered a role at the meeting on 13 November which was subject to some conditions. The claimant satisfied these conditions on 15 November and Mr Holden confirmed that this was the case. I find that there was therefore an offer, with the essential terms being agreed and this was accepted by the claimant.

27. I find it was clear from the email chain that the claimant was acting on this as a contract and had told the respondent he was about to resign his current job. As a very experienced solicitor I would have expected Mr Holden to raise some questions about this at the time if he did not consider that a contractual relationship had been formed. He did not do so and as already noted none of the correspondence was marked subject to contract, nor did the email chain make any reference to any requirement for a further written contract in place.

28. Mr Holden's evidence is that the claimant is placing far too much weight on the words I confirm that is all in order. I find that the claimant certainly considered the meeting and the correspondence to evidence an intention to form a contract. I also find that a reasonable person reviewing what had happened would reach the same conclusion and I consider that on balance, the correspondence amounts to a clear offer with intention to form a contract which is accepted by the claimant.

29. I also find that the terms of the offer are sufficiently clear and unequivocal so that the offer can be accepted without further negotiation. All essential terms had been agreed.

<u>Events after 15 November</u>

30. On 6 January the claimant visited the firm's Hastings office and was given information about his future duties and was issued with a number of documents to read through and given office key. It was common ground that these documents included the induction pack and that the claimant provided joining information to allow payroll to be processed and a copy of his passport. There is a dispute as to why the claimant was given an office key. Mr Holden said it was because his staff told him the claimant was always popping in. The claimant vehemently denied that this was the case.

31. I prefer the claimant's evidence on this point. Mr Holden, as he told me, sits on the top floor of the building and is not aware of comings and goings. He had no direct knowledge of when the claimant attended his office or not, the claimant has direct first-

hand knowledge. On the balance of probabilities, I find it more likely that the claimant was given a key as part of the induction process because it was thought by staff that he was joining imminently, and he was regarded by all as a member of staff. It was not to assist him in popping in randomly.

32. Following that induction, the claimant sent an email the same day stating that he was looking forward to joining them on 17 January and attaching a case transcript. In a reply of 7 January Mr Holden noted that he looks forward to the claimant joining them soon. I find it is understood by all that the claimant is joining the firm on 17 January. There is no reference to any conditionality by the respondent or to any outstanding paperwork needing to be completed.

33. On 8 January 2022 the claimant contacted Mr Holden to let him know that he had just received his P 45 from his previous employer that he would be bringing it in to the respondent's bookkeeper on Monday. The respondent therefore could be in no doubt that the claimant had resigned his previous employment in order to start the job with them.

<u>The written contract of employment.</u>

34. While Mr Holden's witness statement said that the claimant collected a copy of the standard contract of employment to take away and consider and that he did this on 6 January, he accepted his evidence that was not the case. It was agreed that the contract of employment was sent to the claimant in a letter dated 11 January which did not reach him until 13 January. That is four days before his start date.

35. The claimant took issue with the clauses in the contract. On 13 January at 15,10 he emailed Mr Holden to say that he couldn't commit himself to commencing the role as a number of amendments would have to be made to the contract which he had just received and read. He asked if someone could get in touch with him so that they could go through the required changes so that it could be read and signed before he started on the Monday.

36. Mr Holden's response was to suggest that the claimant brought the contract into work on Monday that they could be discussed. I find this does not suggest that the contract was to be signed as a prerequisite to start employment.

37. The claimant was not happy to accept that suggestion and set out his detailed concerns about some clauses of the contract in an email of 14 January. He raised questions about six things within the contract. This included what he believed to be a change to his place of work and his working hours. In his response he set out that he could only work in the Hastings office and therefore reference to work at other offices need to be removed. He also considered that reference in the contract to faithfully

serving the firm and providing his whole time and attention energies and abilities was at odds with his part-time status and asked for a change to clarify that. He objected to text that said he could be asked to work such additional hours as was reasonable. He also raised a point as to holidays and the staff handbook. Finally, he objected to the prior agreements clause in the contract employment as she considered that would absolve Mr Holden many promises and statements made prior to that.

38. Mr Holden responded on 14 January at 11.17 that he could not agree to all of the amendments made to the standard contract. He believed that many of amendments were for the sake of it but specified that it was essential that the claimant could be required to work at the Ashford office. The email concluded if this means you're not prepared to start work with the firm on Monday please let me know and please make arrangements to return the key.

39. The claimant responded at 11.51 the same day. He appears to have taken Mr Holden's response that many of the amendments were for the sake of it an indication of his willingness to make changes to the contract. However, his email set out that he had informed Mr Holden at the meeting he had to based locally as he knows about his need to drop-off and pick up a son from school. Indeed, that was why the parking space had been negotiated. The claimant said he could work occasional Mondays at another location if the firm would pay his travel expenses. He explained that he had left a higher paid more convenient job, fantastic pension scheme and team of 107 friends order to join the respondent if, however, this change was not acceptable to the respondent he would return the office keys.

40. I find, based on the claimant's correspondence that the term which he regarded as a fundamental breach was limited to the change to the office location. He believed that the other points could in fact be agreed between the two. I find, therefore that the claimant's actions were in response to a breach of an express written term.

41. The relationship came to an end on 17 January when the claimant returned keys. It was agreed that the claimant never started work for the respondent and was never paid for any work. The claimant acted promptly in responding to what he believed to be a breach of the contract between the parties and the respondent accepted the contract coming to an end.

42. The claimant considers that the respondent's action in changing his place of work was a breach of the implied term of trust and confidence. He believed, and I have found this to be the case, that the respondent was aware of the reason why he needed to work in one location and chose to disregard this.

Relevant law

Forming a Contract

43. A contract of employment may be either written or oral, or a mixture of the two. For a contract of employment to be enforceable, it must have all the elements of a legally binding agreement; that is there must be an offer, acceptance, consideration and an intention to be legally bound. The relevant considerations are the promise to provide services on the part of the employee and the promise to pay wages on the part of the employer. Once the offer has been accepted there is a legally enforceable contract and either party can sue for a breach.

44. An offer is an indication of a willingness to be bound by a contract. It need not be in writing, but it must be made with the intention of being legally bound as soon as the offer is accepted. However, an apparent intention to be bound may be sufficient, if a reasonable person would believe that the offeror intended to be bound by his or her words or conduct. Where there is a conflict of evidence, the employment tribunal will decide whether, on its findings of fact, an offer was made.

45. The offer must be capable of immediate acceptance. In other words, it must be sufficiently clear and unequivocal to enable the person to whom it has been made to accept it without further negotiation.

Constructive wrongful dismissal

46. Under general contractual principles a breach of contract entitles the innocent party to sue for damages. However, it does not always entitle the innocent party to terminate the contract. Broadly speaking, the right to terminate the contract only arises where the breach in question is sufficiently serious to amount to a repudiation of the whole contract. This may be because the term breached goes to 'the root of the contract', or because the party's words or conduct indicate that he or she does not intend to honour future obligations under the contract.

47. Where one party to a contract repudiates the contract, the innocent party can either refuse to accept the repudiation and affirm the contract or accept the repudiation and treat the contract as discharged. A repudiation or fundamental breach of contract by one party has to be accepted by the other party before the contract can come to an end. If the contract is terminated before the actual start date, the employee will have a claim for wrongful dismissal.

Remedy for breach of contract/wrongful dismissal

48. Where an employee is dismissed (or constructively dismissed) in breach of contract, the general measure of damages is the sum which the employer would have

had to pay in order to bring the contract to an end lawfully – that is the sum payable in respect of the notice period. In Addis v Gramophone Co Ltd 1909 AC 488, HL, the House of Lords ruled that an employee who was wrongfully dismissed without notice could not recover damages to compensate him or her for the manner of the dismissal, for his or her injured feelings, or for the loss he or she may sustain from the fact that the dismissal itself makes it more difficult to obtain new employment.

49. However, it is possible in rare cases for damages to be awarded for losses extending beyond the notice period where the employee's loss has resulted from the employer's breach of contract which is not the dismissal itself.

50. I was referred to Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL. The House of Lords held that the bank was in breach of the implied term of trust and confidence and that if it could be established that the breach of contract caused foreseeable financial loss, then the employees should be able to recover damages for that loss, even if it occurred after the contract had been brought to an end.

51. Losses occurring beyond the end of the notice period can therefore be recovered as damages if they can be shown to be specifically attributable to a breach other than the wrongful dismissal itself. The Addis case does not stand in the way of a damages claim if that claim is rooted in a breach other than the failure to give notice, for example, a breach of an implied term. Hence, in Malik, the loss was directly attributable to the carrying on of a corrupt business, which was a breach of the implied term of trust and confidence, and not to the dismissal itself.

Conclusion

52. In applying the relevant law to my findings of fact I conclude as follows.

Was there a contract formed on 15 November?

53. There is no requirement for an employment contract to be in writing. What is required is offer acceptance and consideration. I have found that Mr Holden made an offer based on their discussion on 13 November and the email chain on 15 November. The claimant clearly accepted this, and this was obvious to Mr Holden. I have found there was an intention to create contractual relations. I conclude that there was consideration in the offer of employment made by the respondent and the offer of his services in return by the claimant.

54. Accordingly, I conclude there was a contract of employment in place by 15 November. Nothing further was required and the introduction of the written terms was therefore in effect a variation of the existing contract.

Was that contract breached by the written terms?

55. I have found that the term about office location was agreed between the parties as Hastings. The respondent fully understood the reason for the claimant's limited ability to attend at other sites. To go to Ashford would be entirely impracticable with a pickup from school and the respondent was aware of this fact. I conclude therefore that sending a written document which changed the place of work, albeit on an occasional basis, and refusing to alter this did amount to a fundamental breach of a term of the contract. This was sufficient to allow the claimant to treat the oral contract as at an end and resign.

56. The claimant reacted very promptly to such breach, and I conclude there is no question of waiver by delay. Both sides accepted the contract between them was at an end.

57. For these reasons I therefore conclude that the claim for breach of contract is well-founded. As set out earlier, I have not gone on to consider what the claimant should be awarded as damages. I note, however that subject to hearing further submissions from the parties on this point, it would appear that the loss is attributable to the constructive wrongful dismissal itself. While the reason for the constructive wrongful dismissal was potentially a breach of an implied term, that is the background to the breach. On these facts the loss here is from the dismissal itself and not from the potential breach of any implied term.

.....

Employment Judge McLaren
09 November 2022