



EMPLOYMENT TRIBUNALS

Claimant: Mr P Thompson
Respondent: Two Fifty Four Limited
Heard at: Watford Tribunal Hearing Centre (via CVP)
On: 3rd October 2022
Before: Employment Judge S Iqbal

Representation

Claimant: Mr Thompson
Respondent: Mr Madete (on behalf of the Respondent)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

JUDGMENT

The judgment of the Tribunal is that:-

- (i) The Claimant's complaint of breach of contract (wrongful dismissal/notice pay) against the Respondent is not well founded and are dismissed
- (ii) The Claimant's complaint of breach of contract in respect of arrears relating to a car allowance against the Respondent is not well founded and are dismissed.

REASONS

These written reasons are produced at the Respondent's request after I found the Claimant's claim against them not well-founded in an oral decision with reasons delivered on 3rd October 2022.

Background and claim

1. The Claimant, Mr Thompson was employed, and started working for the Respondent company Two Fifty Four Limited in or around the 1st February 2021, having signed a Directors Services Contract, dated the 26th January 2021.
2. His annual salary was £40,000 per annum and he was entitled amongst other benefits a company car, with reference to clause 9 of his contract. I have also noted clause 10 of the Claimant's contract of service provided that the company would reimburse the Claimant's reasonable expenses incurred in the course of employment, and that the Claimant was entitled to other benefits such as pension, private medical cover, etc.
3. The Claimant's role was that of Managing Director, working for Two Fifty Four Limited, trading as Visiting Angels Central Surrey. He was also nominated individual, a regulatory requirement by the Care Quality Commission (CQC) for granting a licence to the Respondent (a domiciliary care business).
4. The Claimant resigned on the 1st October 2021, following what he claims was a breach of contract, and on the 6th October 2021, he resigned with immediate effect given what he says were actions of the Respondent in relation to wrongful dismissal.
5. The Claimant brought claims (as highlighted at 8.1) for unfair dismissal, breach of contract and a failure to provide a company car or cash alternative as offered in his contract of employment. His claim form was presented on 23rd November 2021 after ACAS conciliation between 6th October 2021 and 11th November 2021. He claimed compensation only. At 9.2 of his form he highlighted that he had been 1 weeks' notice pay after ACAS conciliation but his notice period was 12 weeks so he was still owed 11 weeks.

6. The respondent presented a response resisting the claim, arguing that the claimant was not dismissed and simply sent a notification of his intention to resign, removing himself as the nominated individual on the CQC's website, without informing the Respondent and thereby jeopardising the business. On the 5th October 2021 after learning of his actions Mr Madete wrote to invite him to a disciplinary meeting on the 8th October 2021. The Claimant did not attend the meeting and resigned with immediate effect on the 6th October 2021. The Respondent in the meantime made a decision to dismiss him on the 8th October 2021 and paid him a week's statutory notice pay.
7. On the 6th July 2022, the Respondent sought leave to amend their response as highlighted above and requested an order that the Claimant was to comply with the CMO to supply details of his employment since leaving them. This was accordingly granted on the 20th August 2022.
8. On the 24th March 2022, the Tribunal gave judgement dismissing the Claimant's claim for unfair dismissal as had been employed by the Respondent for less than two years and the Claimant had failed to give an acceptable reason despite being given the opportunity to so. His other complaints were not affected.

The Issues

9. The issues before me to decide as agreed by the parties are:
 - i. What the notice period was and whether or not there had been a failure to pay notice under the employment contract
 - ii. whether there was a failure to pay benefits namely fully expensed car under the service contract.
10. Given the legal issues to be determined; I considered the following matters:
 - i. Has there been a breach an express term or of the implied term of trust and confidence?
 - ii. Is that breach fundamental? Does it go to the heart/root of the contract?
 - iii. Has the Claimant resigned in response to that breach
 - iv. Has the Claimant affirmed the contract through delay or otherwise?

- v. Even if the dismissal is constructive, is the dismissal unfair or does the Respondent have a potentially fair reason to dismiss? The Respondent says it has a fair reason of conduct or SOSR.
- vi. If the Respondent has a potentially fair reason to dismiss, did it act reasonably or unreasonably in the circumstances and in accordance with the equity and substantial merits of the case (section 98(4) ERA 1996)
- vii. If the dismissal is unfair, what compensation should be awarded under the normal principles.

11. I had before me a bundle of documents consisting of 100-pages, that includes the ET1, ET3 and an amended response (as granted by the Tribunal on application). The claimant appeared in person and gave evidence to support his claim having adopted his witness statement. On behalf of the Respondent the director, Mr John Madete attended to give evidence and also had provided a statement in support of his evidence.

Relevant Law

12. The questions I have asked myself in this case is whether the resignation of the Claimant, Mr Thompson, on the 1st October 2021 or the 6th October 2021 with immediate effect is as a result of conduct by the employer so as to amount to a breach of and express or implied term of trust and confidence, and such that it would sufficiently be serious to entitle his resignation.

13. The relevant law in relation to this, is to look at whether the employer, is guilty of conduct which is a significant breach going to the root of the contract of the employment, which shows that the employer is no longer or intends to be bound by one of more of the essential terms of the contract.

14. In order for the circumstances to entitle the employee to terminate the contract without notice, they have to demonstrate that there is a breach of contract by the employer, that that breach of contract is sufficiently important to justify the employee resigning, and the employee must leave in response to that breach.

15. In the case of **Western Excavating (ECC) Ltd and Sharpe** 1978 IRLR 27 Lord Denning MR held that:

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed.

16. Therefore, in order for the circumstances to entitle the employee to terminate the contract without notice, they must demonstrate a breach of contract by the employer, secondly that that breach is sufficiently important to justify the employee resigning; the employee must leave in response to the breach; and that the employee must not delay such as to affirm the contract. Lastly that the breach relied upon can be a breach of an express or implied term.

17. In **Mahmood v BCCI** 1997 ICR 607 confirmed that *“the employer must not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.”*

18. It is implicit in the case of **Mahmood v BCCI** that the conduct will amount to a breach of the implied term of trust and confidence and it would be sufficiently serious such that the employee would be entitled to resign and claim constructive dismissal. That position was expressly confirmed in **Morrow v Safeway Stores Ltd** 2002 IRLR 9.

19. The proper approach is as set out in **Kaur v Leeds Teaching Hospitals NHS Trust** [2018] EWCA Civ 978 (01 May 2018) at paragraph 55 where it was held that:

‘it is sufficient for a tribunal to ask itself the following questions:

- (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*
- (2) Has he or she affirmed the contract since that act?*
- (3) If not, was that act (or omission) by itself a repudiatory breach of contract?*
- (4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was,*

there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

(5) Did the employee resign in response (or partly in response) to that breach?

20. To satisfy the burden of proof on a wrongful dismissal/notice pay claim, it is sufficient for the employee to establish (on the balance of probabilities) (i) the existence of the employment contract (ii) the existence of a term in that contract requiring the employer to give the employee a minimum period of notice of termination of the contract (iii) the fact that the employer terminated the employment contract without giving the employee that minimum period of notice. (iv) If the employee establishes the above, the burden shifts to the employer to prove, on the balance of probability, that the employee committed gross misconduct entitling the employer to summarily dismiss the employee without notice. Where the employee has committed a repudiatory breach of contract such that the employer's trust and confidence in the employee is so damaged that the employer should not be expected to continue with the employee's employment (*Briscoe v Lubrizol Ltd [2002] IRLR 607*). The tribunal is to decide the degree of misconduct necessary for the employee's behaviour to amount to a repudiatory breach of contract. Whether or not the employer is entitled to dismiss summarily is an objective point for the tribunal to decide bearing in mind what the employee actually did or did not do, as a factual finding, on the balance of probabilities. Where a tribunal finds that the employee did not commit the misconduct alleged, then it follows that there was no entitlement to summarily dismiss. Conversely, a tribunal may conclude that an act of misconduct was in fact gross misconduct even where the respondent would not automatically describe it as such in their own policies and procedures.

Findings of Fact

21. I have considered the actions of the Respondent on the 6th October 2021, to consider whether they have acted without reasonable and proper cause in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence.

22. In make the following finding of facts having considered the totality of the evidence before me:

Emails of 1st October 2021

23. The Claimant's evidence in his statement [98] was that on the 28th September 2021, he was informed by Mr Madete that his payment would be delayed by a few days. The Director's Service Contract at §8.2 [34] sets out that the annual salary would be payable monthly in arrears on or about the 25th of each month. The delay clearly amounts to a breach of an express term of contract. However, the claimant in his statement confirms that he was okay with this, although he assumed it would be by the end of the month that he would receive his pay. He further states that this led to his email of the 1st October 2021 at 06:30 [56], to Mr Thompson, asking about his pay for the month of September 2021, and at this stage he also questioned not having a company car and that he had increased train expenses. Further he queried the company being in financial difficulty, in which case he would need to take immediate action. I find the tone of his email is antagonistic especially, as I have considered later in this decision, he is entitled to and has claimed previously reasonable reimbursements under his contract (see §10 at [35]) connected to his travel. Further on his own evidence, it is clear the claimant had been informed of the delay in his payment for that month, he had accepted it and there is no evidence that he questioned the length of the delay until the 1st October 2021 [56].

24. I find Mr Madete's evidence is consistent with his email below that he had previously informed Mr Thompson about the fact that there would be delay to both their wages and as per his email he gave a clear time frame of the following week in which they would be paid. The email was sent at 09:05 [57] and highlighted to the claimant "*As the Managing director ...you aware that we generated only £2k revenue. We are 90% behind the business plan budget and this has caused significant concern with our funder. Pending discussions with him, I informed you that you will be paid next week....*"

25. Unrelated to that Mr Madete further sent another email at 09:05 [55], in which, simply copied in Bella Hallam, one of the franchisers representatives (including her email from the 30th September 2021), asking whether or not the business plan reviewed for the Monday (the 4th October 2021) was still going ahead.

26. The Claimant responded to the first email at 09:52 [57] on the same day in which he raised concerns about the short-term viability of the business and due to not having been paid, he cited the breach of contract and therefore asked for the email to be accepted as formal notice of his intention to resign. He highlighted that for a smooth transition and to avoid problems with the franchiser and CQC, a meeting was arranged at his earliest convenience. However, I find that his resignation on the 1st October 2021 sent by email, was not as the result of a breach of contract by virtue of a failure to pay his wages after he was informed on the 28th September 2021 about a delay to payment. I find on balance given the matters I have highlighted above the claimant, accepted the delay and continued his work for the Respondent thus affirming his contract.
27. However, I find the claimant's resignation email on the 1st October 2021, is related to questions raised over his performance and this is further highlighted by what I find is heated e-mail correspondence between the claimant and the private investor, Mr Mugambi Nandi [52-54] on the same day. The claimant was asked to sign a loan note instrument by Mr Nandi on the 22nd September 2021 [54] given that he had invested more than had initially agreed to in the sum of £100,000, to which the claimant did not respond. The claimant in responding to a further email from Mr Nandi refused to sign the loan note but also stated, he assumed that his refusal to sign as a guarantor would mean funds would not be released and he would remain "unpaid".
28. The emails ended with both parties venting their frustrations. Mr Nandi highlighted that given the Claimant's performance was under scrutiny he did not wish to remain with the Respondent and on the other hand the claimant highlighted that it was clear they had lost faith and trust in one another as he felt like he was the 'scapegoat' for the business difficulties. I find these emails are indicative of the difficulties the company was facing and that some of the issues were being raised with the claimant which he felt were not within his remit.
29. This resulted in the claimant, unilaterally made the decision to inform the CQC on the 1st October 2021, that he was resigning as the nominated CQC individual. The claimant's evidence is that he put forward the name of Mr Madete as the new nominated individual, as he had been informed that he would be taking over as the nominated CQC holder.

30. However, the only evidence of that the CQC had been notified is an automated email in response from them dated the 1st October 2021 [59]. It sets out that he had successfully submitted a form to CQC on behalf of Two Fifty Four Limited. The type of application is listed as “notification of the appointment of a nominated individual”. I do not on balance accept that this in itself is sufficient to demonstrate that the claimant took the necessary actions to ensure the company was protected by appointment of an appropriate individual for the reasons I consider below.

Meeting of the 4th October 2021

31. There was further email correspondence between Mr Thompson and Mr Madete on behalf of the Respondent about a meeting with the franchiser on the 4th October 2021. From the notes [61-63] provided of that meeting, it appears that both Mr Madete, Miss Hallam and the claimant attended in person. There were a number matters raised insofar as the frustrations with the way in which the start-up had progressed, but as an AOB it appears that on that date there is a note that support was provided to JM, the initials for Mr Madete “*to inform CQC of a change to the nominated individual. JM actioned the notification during the review, JM has taken on the role of nominated individual and understands the importance and possible implications of that responsibility*” [62].

32. I find that nowhere within the meetings notes, which took place with an individual who can be regarded as independent, namely Mrs Hallam, does it indicate that the claimant had taken any action to nominate another individual to CQC or that as claimed by the claimant in his statement that he had discussed leaving with Mr Madete on the 27th September 2021 and nominating Paula Carman (registered manager and director) and/or Mr Madete himself. I therefore find on balance that the totality of the evidence as highlighted above does not support the claimant’s evidence in his statement [98] that “*John informed me he had taken advice from the franchise saw and he was going to take over as the nominated individual. Nothing else was agreed regarding leaving date et cetera.*”

33. What I further consider from the meetings notes, is that Mr Thompson states, *“PT disclosed that he would support the business throughout his notice period and would work with JM to come to an agreement on his departure date.”*

34. Whilst Mr Thompson, provides the evidence in the form of the automated email about a ‘nominated individual’, I find on balance had he taken the appropriate and required action, Mr Madete would not have to have been supported during the course of a meeting on the 4th October 2021 to ensure that he was correctly nominated as the CQC nominated individual. Further I find this further corroborates Mr Madete’s evidence that on learning at the meeting of the 4th October 2021, what Mr Thompson had done he decided to take further action by way of an email at 11:11 on the 5th October 2021 [64] addressing the terms of the Claimant’s exit given that he had informed the CQC about his resignation.

Correspondence of the 5th October 2021

35. The claimant’s response on the 5th October 2021, at 11:55 [65] was that *“The reason I had to let the CQC know was that I didn’t know if I could continue, having not been paid, which I hope you understand”*.

36. Mr Madete’s response at 12:17 [65] highlighted the fact that having taken this action unilaterally he had placed the company in serious jeopardy and further that *“You have indicated verbally to me that you intend to leave as soon as possible. The company has options based on your performance and conduct but I prefer not to go into those if you are leaving. Your stay is no longer tenable. As you are the one who tendered your resignation without mentioning notice, you have the option of requesting for a waiver of notice, for a clean break for all. I am happy for you to leave as early as tomorrow.”*

37. In response, Mr Thompson confirmed by email on the 5th October 2021 [66] that he had been paid his wages for September, which I find is in accordance with the timetable given by Mr Madete in his very first email to the claimant on this issue. In an email sent at 20:50 [67], Mr Madete attached a letter [70-71] inviting Mr Thompson to attend a meeting on the 8th October 2021, as the Company was considering dismissing him from employment in light of his:

- poor performance

- Gross misconduct:
 - (i) neglecting his statutory duties to promote the success of the company and act in good faith
 - (ii) (ii) prejudicial conduct in informing the CQC that he intended to resign with immediate effect (rather than at the end of his three months' notice period) and without informing anyone that he had notified the of the same thus placing the company as risk from a regulatory and franchise agreement perspective.

Grievance

38. What followed was an email exchange on the 6th October 2021 in which Mr Thompson stated that he felt that disciplinary hearing was an attempt to pre-empt the decision for his dismissal without notice therefore he was resigning with immediate effect. As such that he would seek advice from ACAS in relation to breach of his contract of employment and not honoring his notice period.

39. I find that Mr Thompson was indeed frustrated in relation to his employment and questions about his performance, but in retaliating and unilaterally withdrawing himself as the nominated individual with the CQC, he failed to take any action to protect the interest of the company.

40. I find therefore that the Respondent was entitled to raise this issue as a serious breach of contract as it certainly left their business in potential in breach of CQC rules (Regulation 6) [79]. Further having considered the Directors Service Contract [27-28] at clause 5: general duties as a director and clause 16.1: ceasing to be a director, I find that the claimant has particularly, failed in his general duties as a director in particularly with reference to 5.2(e) in failing in his duties to protect the company in accordance with its franchise agreement and with reference to his resignation he failed under 16.1 to obtain the approval of the board before tendering it.

41. Whilst the Claimant did not attend the meeting and Mr Madete proceeded to dismiss, Mr Madete he now accepts as per his statement at [31] that was unable to dismiss the claimant given he had already given his resignation “ with immediate effect”.

However, I note the Respondent has also paid the claimant mistakenly a sum of £2,251.95 as terminal dues, which they did not seek to reclaim.

Company Car

42. The second issue that I go on to consider is in relation to the company car. As I have noted that the service contract at [34] provides for a fully expensed car at clause 9(a).

43. I have noted that there is payment to Mr Thompson between the months of March and April 2021 after he made claims for mileage. I further have emails from Mr Thompson, dated 6th May 2021, which show he was in discussions with Andrew Gibbs at AMG Financial, the company's outsourced accountant, in relation to a lease car seeking advice on the implications of leasing a car in his own name and being reimbursed by the company.

44. Mr Thompson on the 14th May 2021, emailed Mr Madete, highlighting:

“It appears that I can lease privately and I can recharge it to the company and then take it as a benefit for which I will be taxed, that is the P11D, the issue is I hold liability of the car, so if I am let go I will be left with the lease liability, I can live with this as the upfront payment would be covered by the company so some risk is shared, and I hope that won't happen. To keep the tax low for both, I have been looking at plug in hybrids and attach it as a current deal which seems good value. If this isn't what you thought in terms of a car and cost, we can discuss a cash alternative or other options. I have the quote summary.”

45. However, since that date, I have nothing further from either party as to what agreement was reached in relation to the issue of a company car. There are no further mileage claims post April 2021, but neither is there any further correspondence to resolve the issue. However, having heard from both parties and the clear evidence that mileage claims were paid in line with the service contract at clause 10 then, I find I am satisfied that if the Claimant had any further such expenses with reference to mileage, then he would have been reimbursed in the same way.

46. For the sake of completeness, I have noted that the Claimant raises no grievance, since May 2021, at the time when there were ongoing discussions for a company vehicle and neither does he provide any evidence to demonstrate that he was required to use his vehicle during these months which required him to expend any monies.

Conclusions

47. The question that I must consider is whether the respondent has breached an express or an implied term of trust and confidence? In relation to the later, I will need to decide if the respondent has behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent. If I find that they have then I must decide whether the respondent had a reasonable and proper cause for such behaviour.

Breach of an express terms

48. I have considered the Respondent's failure to pay the Claimant's wages in accordance with his Director's service contract and I am satisfied that it is a breach of an express term, however, the claimant's actions in continuing with his employment and accepting the delay on his own evidence demonstrates on balance that he affirmed his contract.

49. Insofar as the claimed breach of contract in relation to the provision of a company car was concerned, whilst this was also a breach of an express term of his contract, I have found above the claimant had affirmed his contract despite this breach as he claimed for his mileage and was in a position to continue to claim any travel expenses in lieu of a company car.

50. There is nothing to demonstrate that this was a matter that had overly concerned the Claimant before his email resigning on the 1st October 2021 and I find he has simply added it to strengthen his claim against the Respondent. In any case I find the breach of these express terms were not sufficiently serious to entitle his resignation.

51. I go on therefore to consider below the way in which the claimant states the respondent was in breach of the implied term:

Has the respondent breached the implied term of trust and confidence

52. The claimant states he resigned as he had not been paid in time for the month of September. On his own evidence he was informed by Mr Madete on the 28th September 2021 that his wages would be delayed by a few days and without querying the length of delay, he appears to have sent an email two days later querying his payment and the state of the company finances. Mr Madete on behalf the Respondent, at all times confirmed to the Claimant the delay and the timescale within which they would be paid. I find that that the Respondent as a new company was not performing as they had first expected they would and were open in their discussions with the Claimant.
53. However, when his performance came under scrutiny as a result, the claimant did not accept any responsibility, financial or otherwise. I find it is this that led to the aggressive and defensive tone of his emails, followed by his unilateral actions in stating he was resigning on the 1st October 2021, without approval of the board and withdrawing as nominated CQC individual. In all the circumstances, I find the claimant's actions cannot be considered a reasonable response to the late payment of wages.
54. His resignation with immediate effect on the 5th October 2021, he says was a response to the grievance raised by the Respondent as highlighted above. But as I have noted above the Respondent's complaints particularly about removing himself as nominated CQC holder was prejudicial to the company and the Respondent was entitled to raise this with the Claimant.
55. I have considered the matters cumulatively and I do not find there is anything to demonstrate from the Respondent's actions that they have conducted themselves in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. They have at all times engaged with the Claimant and when his performance was under scrutiny, it appears that was not up to the challenge and therefore attempted to use the issues in relation to late payment and the failure to provide a company car as a way out.

56. I am further satisfied that on the 5th October 2021, the respondent was entitled to raise issues in relation to his actions, given they had discovered the seriousness of his actions in withdrawing as CQC nominated individual.

57. For all these reasons, as I have already highlighted, my judgement is that both parts of the claim are not well-founded and therefore the claim is dismissed.

Employment Judge Iqbal

Dated: 5th December 2022

JUDGMENT SENT TO THE PARTIES ON

Date: 8 December 2022

FOR THE TRIBUNAL OFFICE

Note

Public access to employment tribunal decisions

All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.