Case Number: 2300453/2022

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Osvald**

Respondent: **Holden and Co LLP**

Heard at: **London South Hearing Centre (by video)**

On: **5 May 2023**

Before: **Employment Judge Mclaren**

Representation

Claimant: In Person

Respondent: Mr. P Orji, Solicitor

REMEDY JUDGMENT

The claimant's complaint that there was a breach of contract having succeeded the tribunal makes an award of £1354 being four weeks pay.

REASONS

Background

1. There was a liability hearing in this matter on the 26 October 2022 in which I found that the claimant's complaint of breach of contract was well-founded and succeeded. This matter today was listed to address the question of the appropriate remedy.
2. In advance of the hearing the respondent provided a skeleton argument and attached a number of documents to that, namely the contract of employment that had been sent to the claimant, a job description, and an extract from the disciplinary policy and procedure. The claimant provided a bundle of 655 pages containing his submissions, legal authorities and evidence of his attempts to mitigate his loss.
3. I agreed with the parties that there were two areas of dispute that I have to determine. The first was what was the notice period that governed the contractual relationship between the parties. This is relevant because it is

respondent's contention that any remedy should be limited to contractual damages alone.

4. The second was whether on the facts and circumstances of this case the claimant could establish that the breach of contract arose from an implied term, the breach related to something other than dismissal and that this breach caused foreseeable financial loss so that he could recover damages for that loss.
5. I had addressed this to some extent in the liability finding which had found as follows

> *"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.*
>
> *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."*

6. I had agreed, however, at that hearing that, because the claimant wished to make submissions in support of compensation beyond any agreed notice period that I would hear those at a separate remedy hearing which was the purpose of today's hearing.
7. In reaching my decision and considering the amount to be awarded I considered the written and oral submissions by both parties and the documents which I have been provided.

Preliminary matter

8. The claimant made an application that the respondent's written submissions and any law to which they wished to refer to be excluded from the hearing because

they had not sent their written skeleton seven days in advance of the hearing as the employment tribunal had directed.

9. I heard both parties on this application and determined that the written skeleton could be relied upon by the respondent. The tribunal directions and made it clear that in the absence of written representations both parties would have a full opportunity to say what they wish to and therefore there was little to be gained in excluding a written document as its substance would then be repeated verbally anyway. A skeleton argument is useful and I find it is of great assistance to the claimant to have a document in writing than to have to listen and note oral submissions.
10. I explained that I cannot exclude case law from my decision and both parties have an obligation to draw my attention to any case law that is relevant.

Remedy findings

What was the contractual notice period?

11. The contract of employment specified at paragraph 1 that the agreement was subject to a three month probationary period. Paragraph 9 of the contract set out the right of termination and specified that the relationship could be terminated with not less than four weeks notice during the first two years of continuous employment.
12. It was initially submitted by the respondent that the reference to a probationary period at paragraph 1 of the contract entitled it to give the claimant one week's notice during the probationary period ,and that this had been explained to the claimant when the terms and conditions are being negotiated. The respondents representative then accepted that this was not the case, no such conversation had taken place and the contract of employment did not provide for shorter notice during the probationary period.
13. The respondent's representative then indicated that the staff manual is incorporated into the contract and it is the staff manual that includes the shorter notice period during probation. We adjourned briefly to allow the respondent to send the tribunal a copy of the staff handbook. Upon our return the representative confirmed that this was not the case, there was no such reference.
14. The respondent's representative therefore accepted that, as far as the written contract was concerned, the notice period during the first two years was four weeks.
15. As I had previously determined, this written contract was not the contract that governed the terms between the parties. That had been formed from the email exchanges and some conversations and was in place by 15 November 2021. It was accepted that this oral contract made no express reference to any notice period.
16. Both parties agreed that four weeks would be a reasonable notice to be implied into this contract.

Relevant Law on notice period

17. I was referred to the decision of the employment tribunal taken by Employment Judge Ord on the 23 March 2016. This set out that where no contractual notice period agreed, then it is a question of what is reasonable.

18. The Employment Rights Act 1996 sets out minimum periods of notice so that one week applies where an employee has been employed for at least four weeks. However, that is only the minimum period, the test is what is reasonable.

Conclusion on Length of the notice period

19. I have found that no notice period was expressly agreed between the parties when the verbal contract was formed by 15 November. I've also found that the respondent's practice, as evidenced by its standard contract template, would be to provide four weeks notice during the first two years of employment.

20. I note that the statutory minimum provides for one week's notice after a period of one month. The claimant was not employed even as long as that. Applying the relevant legal principles I must determine what is a reasonable notice period to be implied into this contract.

21. Based on the respondent's practice and by agreement with the parties I conclude that this would be four weeks.

22. The parties also agreed the method of calculating four week's notice and agreed that this would be a figure of £1354. That is calculated by dividing the annual salary of £17,603 by 52 to obtain a weekly figure and then multiplying that by 4 to obtain a figure for four weeks pay.

Relevant law-damages for breach of contract

23. While I set out a summary of the relevant law in my liability decision, I set out a fuller summary in this decision. With the exception of Johnson, the cases I have referred to below were relied upon by the claimant.

24. Wrongful dismissal is a dismissal in breach of contract. The employee will have a claim in damages if the employer, in dismissing them, breached the contract, thereby causing them loss. The remedy is to put the employee in the position they would have been in had the contract been performed by the employer lawfully terminating the contract. As this is a claim for an unliquidated sum (the wages not having been earned) it is subject to mitigation.

25. 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.

26. In general, the law of contract is that it is not possible to recover damages for mental distress, anguish, annoyance, loss of reputation or social discredit caused by the circumstances or manner of a breach of contract .The manner of the dismissal does not entitle an employee to compensation for loss additional to that available for breach of contract.

27. There are nonetheless rare cases where damages may 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.

28. I was referred to Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL, in which it was held that damages for breach of the implied term of trust and confidence should be assessed in accordance with ordinary contractual principles. In that case , 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. Losses occurring beyond the end of the notice period will only be recoverable as damages if they can be shown to be specifically attributable to a breach other than the wrongful dismissal itself.

29. In Johnson v Unisys Ltd 2001 ICR 480, HL the impact of the manner of the dismissal itself was considered . The majority determined that the implied term of trust and confidence was concerned with preserving the ongoing relationship between the parties and was not appropriate for use in connection with the way in which the relationship is terminated. The majority considered that it would be contrary to public policy and an improper exercise of the judicial function to develop a new common law right which covered the same ground as the statutory right not to be unfairly dismissed, as this would fly in the face of the statutory limits that Parliament had prescribed in the legislation on unfair dismissal.

Mitigation

30. The employer's liability will normally cease before the date of the remedies hearing if the employee has (or ought to have) got a new permanent job paying at least as much as the old job as there will no longer be a loss arising from the dismissal.

31. The current Presidential Guidance on mitigation provides as follows:

- All persons who have been subjected to wrongdoing are expected to do their best, within reasonable bounds, to limit the effects on them. If the Tribunal concludes that a claimant has not done so, it must reduce the compensation so that a fair sum is payable.
- The Tribunal will expect evidence to be provided by claimants about their attempts to obtain suitable alternative work and about any earnings from alternative employment.
- The Tribunal will expect respondents, who consider that the claimant has not tried hard enough, to provide evidence about other jobs which the claimant could have applied for

Submissions on damages

32. Both parties agreed the legal position. That is, as I set out above, the general proposition is that wrongful dismissal damages that arise from the dismissal itself are limited to payment for what would have been the notice period.

33. Further financial loss beyond the notice period can only be awarded in limited circumstances. Those are that the breach of the implied term of trust and confidence arose from something that is not the dismissal itself. Foreseeable financial loss may then be recoverable.

34. In his submissions the claimant made the following points. His argument was that from the evidence I heard at the liability hearing it was beyond reasonable doubt that Mr Holden never intended to honour the verbal contract. It was submitted that it was Mr Holden's intention to deceive the claimant into signing a contract worded so as to breach the agreement reached by 15 November. The claimant referred me in his written and oral submissions to many examples of what he said was Mr Holden's lack of truthfulness in support of his argument that Mr Holden knew he was not going to honour the agreed terms. He concluded there were simply too many examples of this for it to be a mistake or error or to be given some generous interpretation other than dishonesty.

35. In this way the claimant states that the breach of the implied term occurred before he was sent a written contract. The breach occurred at point prior to that when Mr Holden determined that he was not going to honour the contract and I could conclude that was the case because of his actions, that is the dishonest conduct, which had occurred.

36. The claimant further submitted that his losses flow from this breach and not from the dismissal and it was this breach which caused foreseeable and continuing financial losses. He submitted that it was foreseeable that he would not get a job comparable to the one he held at Royal Mail, especially in the post covid economic downturn and in particular because of his age. Having to take legal action against the law firm meant the prospect of obtaining a job in the legal profession was unlikely and this was also foreseeable.

37. The respondent's submission was that there were no findings of fact made my liability decision about any dishonesty. There was clearly no intention to breach the contract prior to the event on which the claimant relied. There was no evidence Mr Holden didn't intend to act on the contract. As to any reputational damage which the client was seeking, the respondent considered that that was not because of the respondent's actions but because of those of the claimant in publicising his views about the respondent to all the local law firms.

Conclusion- Damages

38. The claimant has not persuaded me that there is any evidence that Mr Holden always intended to breach the contract and therefore that there was any breach of the implied term of trust and confidence prior to or other than the dismissal itself. I accept Mr Holden's evidence was contradictory and I preferred the claimant's evidence to that of Mr Holden, however, I did not make any findings that Mr Holden intended to deceive all had in some way agreed with the claimant that would work only locally while always intending that he would not honour that promise.

39. I conclude that it is too big a leap to interpret Mr Holden's as an active intention to breach the contract and to find that he had no intention of honouring the

contract. There is therefore no breach of any implied term prior to the dismissal itself.

40. On that basis, the losses can flow only from the dismissal and are therefore limited to the notice period. And therefore awarding the claimant a sum equivalent to 4 weeks pay. While the claimant made many attempts to mitigate his losses. I conclude that is entirely reasonable that he was unable to do so in a four week period. I am therefore not applying any reduction to this.

05/05/2023
Employment Judge McLaren