



EMPLOYMENT TRIBUNALS

Claimant: Ms S Campbell

Respondent: AA Holmes Limited

Heard at: West Midlands (Birmingham)
Employment Tribunal

On: 17 &18 July 2023

Before: Employment Judge Childe

REPRESENTATION:

Claimant: In person

Respondent: Ms McIntosh (consultant)

JUDGMENT

1. The claimant's complaint of breach of contract in relation to notice pay is well-founded. The respondent is ordered to pay the claimant the sum of £11,657.09 as damages for breach of contract. This figure has been calculated using gross pay to reflect the likelihood that the claimant will be taxed upon it as Post Employment Notice Pay.
2. The respondent's counter complaint of breach of contract is not well founded and is dismissed.

Summary of the case and Issues to be determined

1. This is a claim for breach of contract only.
2. I spent some time at the outset of the hearing confirming the issues in dispute.
3. The claimant says that the respondent was in fundamental breach of clause 8 of her contract of employment, which was the clause that dealt with her salary. The claimant says she was told by the respondent on 26 January 2021 that her salary would reduce by 25% with effect from 1 February 2021 and this was a fundamental breach of a contract of employment.
4. The claimant also says the respondent was in breach of the implied term of mutual trust and confidence by the way in which the reduction in salary was implemented.
5. The respondent brings a counterclaim in which it is said that the claimant was in breach of her contract of employment by resigning partway through her notice period. The respondent sets out a number of losses which it claims it has suffered as a result of the claimant leaving employment partway through her notice period.

Introduction

6. I had access to an agreed tribunal bundle which ran to 164 pages.
7. Witness evidence was provided by the claimant herself. From the respondent, I was provided with witness statements from Kate Perry, director of the respondent, private client fee earner and chartered legal executive. Christine Austin, private client fee earner. Emma Kearsey, operations director. Kate Icke, external accountant to AA Holmes Limited and Anthony Holmes, director, solicitor and founder of the respondent.

8. At the outset of the hearing the claimant requested access to a document which showed what she had billed as a solicitor during the period of her employment from the respondent. This document was obtained during the time the tribunal took to read the paperwork in the morning of day one and was supplied to the claimant at noon on the first day. The claimant was given time to consider it before giving her evidence.
9. During the claimant's evidence it emerged that she had kept a hand-written note of the fees she had generated during her employment with the respondent. This document hadn't been disclosed prior to the hearing. The claimant disclosed this document over lunch and it was available to the respondent from 2 o'clock on the first day of the hearing.
10. Finally, the claimant's resignation letter dated 1 February 2022 was not in the agreed bundle. This was provided over lunch on the first day of the hearing and made available to both parties at 2 o'clock on the first day.
11. The claimant, Kate Perry and Kate Icke were cross-examined on the first day of the hearing. Submissions were made on 17 July 2023 (the first day of the hearing) and judgement on liability and remedy were delivered on 18 July 2023 (the second day of the hearing).

Findings of fact

12. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point.
13. The claimant is a fully qualified conveyancing solicitor specialising in rural residential properties.

14. The respondent is a small firm of solicitors based in Broadway in the Cotswolds specialising in private clients and at the time, conveyancing. The firm has only one office and is authorised by the solicitor's regulatory authority ("the **SRA**").

15. The claimant commenced employment on 1 May 2021. The claimant signed a contract of employment on 6 April 2021. The key sections of the contract are as follows:

a. 7. HOURS OF WORK

7.1 Your normal working hours shall be 09.00 to 17.00 on Monday, Tuesdays, Thursdays and Fridays and these hours and days are not variable although you may be required to work such additional hours as are necessary for the proper performance of your duties.

b. 8. SALARY

8.1 You shall be paid an initial salary of £75,000 per annum (inclusive of any fees due to you by us as an officer of (he Company) and it is expected that you will generate £150,000 plus VAT per annum in fees.

c. SCHEDULE 1 -SALARY ARRANGEMENTS

It is envisaged that for the initial six-month period, your salary will be based on £75,000 per annum.

Subject to satisfactory completion of your probationary period, one of three outcomes will follow:

1. Your invoiced fee level has achieved the equivalent of £150,000 per annum, or reasonable expectation of the same, and your salary continues for a further six months at £.75,000 per annum;

2. Your invoiced fee level has not reached the equivalent of £150,000 per annum, or reasonable expectation of the same. At this point, we reserve the right to renegotiate a lower salary level for the next six months, appropriate to the level of achievable fees In that period;

3. Your invoiced fee level has exceeded the equivalent of £150,000 per annum, or can reasonably be expected to exceed that level within an acceptable timeframe. With this outcome, your base salary will remain at £75,000, but you will become entitled to a "profit share" arrangement for the next six months.

The "profit share" arrangement will award you with 90% of the profit arising from the Conveyancing Department that you will head up.

Conveyancing Department Profit will be defined for this purpose as:

Fees actually invoiced

Less; Actual salary cost of the conveyancing team

Less: Your actual salary cost (incl NIC and pension)

Less: Overhead apportionment (as set out below)

Overhead apportionment will be defined as:

Direct cost of conveyancing software

Direct cost of conveyancing subscriptions

50% of all other overhead costs for A A Holmes Ltd ("the Firm")

All costs will be calculated in accordance with generally accepted accounting principles, and in line with the accounting policies currently adopted by the Firm's year end statutory accounts.

Profit for this purpose will be calculated by the Firms' accountant, and presented for discussion.

The decision of what constitutes "reasonable expectation" of achieving targets, will be subject to discussion, but ultimately will be agreed at the discretion of Kate Perry.

After the initial 12 month period, annual salary and profit share reviews will keep the ongoing salary arrangements appropriate to ongoing circumstances.

16. On 21 December 2021 the claimant handed her notice in to the respondent and gave six months' notice as required under her contract of employment.

17. In December 2021 the claimant raised an oral grievance with Kate Perry that Emma Kearsey had bullied her and treated her in a high-handed way. This grievance was never dealt with by the respondent.

18. On 20 January 2022 the respondent employed a locum solicitor to assist the claimant with her workload. This locum solicitor a qualified solicitor and was on the SRA roll as a result.

19. On 26 January 2022 Kate Perry emailed the claimant. In this email Kate Perry told the claimant that her contracted monthly target of £12,500 in fees had not been met. Kate Perry then went on to say the following '*Please accept this email as notice of a salary change, as per Schedule 1, outcome 2, **effective** from 1/2/22 to £56,250. This represents a reduction of 25% to reflect the 25% shortfall in the annualised invoiced fee level (my emphasis).*'

20. Kate Perry went on to say in this email '*Please be assured that if the deficit is made up and you achieve the agreed annualised fee level, I will be happy to **reinstate** your salary to £75,000 and pay the associated salary accordingly (my emphasis).*'

21. On 26 January 2022 the claimant emailed Kate Perry and said that she didn't accept a reduction to her pay which she believed was a breach of contract. The claimant asked to meet Kate Perry to discuss and attached a copy of her contract of employment.

22. Kate Perry did not meet with the claimant as requested. She insisted instead that the claimant met with Emma Kearsley in attendance. This was not acceptable to the claimant as she had previously raised an oral grievance in December 2021 about Emma Kearsley that I have referred to in paragraph 17 above.
23. Instead, an exchange of emails took place. Before I go on to look at those emails, I make the finding of fact that the claimant did not have the opportunity, prior to her resignation, to discuss with the respondent the level of fees she believed she had billed and why she believed it was not fair to reduce her salary as the respondent had decided to do.
24. On 28 January 2022 at 1726 Kate Perry emailed the claimant and said that she would be willing to have a discussion with the claimant about her hours and salary. Kate Perry proposed that the claimant worked a five-day week for the same salary to make up the budget shortfall for the conveyancing department.
25. On 30 January 2022 at 1757 Kate Perry emailed the claimant and said, *'If we can reach an agreement along the lines of what I have proposed in my email of the 28th January 2022 that will be favourable to the firm's financial position, as stated previously, I will continue to pay your current salary until the end of your notice period.'*
26. The claimant responded by email at 0909 on 31 January 2022 and said *'just to clarify, you want me to work five days a week but for my take salary to not increase to match five days under the contract, as I'm currently paid per rata for four days. Effectively you are asking to reduce my salary for the remainder*

of my notice period, is that correct? And, please clarify, is this from first February 2022.'

27. On 31 January 2022 at 1039 Kate Perry responded to the claimant by email. She said she couldn't respond to the claimant that day due to work pressures. She said the claimant should focus her working day on fee earning for the firm as her conveyancing department was 25% under target. Kate Perry said it was open to the claimant to *'put forward a business plan to demonstrate how your salary can be paid in full, whilst operating substantially below the agreed target, to not put the firm at financial risk.'*
28. The claimant spoke to Kate Perry at the end of the day on 1 February 2022 to ask whether she had reviewed the claimant's figures, with the implication being that this would avoid the need to reduce the claimant's salary. Kate Perry said she had not reviewed the figures.
29. Kate Perry said in evidence that it was never her intention to reduce the claimant's salary by 25%, as she had set out in her email of 26 January 2022. I find that if this was Kate Perry's intention, it was certainly never communicated to the claimant prior to her resignation. Quite the opposite was communicated to the claimant. The claimant was told in no uncertain terms that her salary would reduce by 25% with effect from 1 February 2021. The email chain that I have referred to above makes it plain that the claimant's salary would only be restored if the claimant made up the budget in shortfall for the conveyancing department before the end of the financial year.
30. On 1 February 2022 the claimant took legal advice and was told if she remained in employment with the respondent, once the date for the unilateral reduction in the claimant's salary had passed, she would be accepting the

new contract of employment, with the new reduced salary that came with it.

The claimant considered her position carefully and decided she could not accept the reduction in her salary that the respondent had said it would implement. She decided to resign with immediate effect.

31. The claimant stayed for four hours that evening to do everything she could to minimise the impact of her resignation on clients. She emailed her clients and prepared a detailed handover note for the locum conveyancer to enable them to pick up her work.

32. I find as a fact that the claimant had had been told by Kate Perry that the founder of the firm, Anthony Holmes, was prepared to rejoin the practice and obtain a practising certificate, prior to her resignation. There is a dispute in evidence on this point and I have accepted the claimant's version of events. The claimant was clear and cogent in the evidence she provided on this point. I find it incredible that Kate Perry would not have had a discussion with Anthony Holmes, the most obvious person who could reregister with the solicitor's regulatory authority and go back on the roll, prior to 1 February 2021, given the claimant had resigned in December 2020 and was the only permanent member of staff who was a qualified solicitor.

33. I find as a fact that the claimant resigned on 1 February 2022 because the respondent had given clear and unequivocal notice that it intended to unilaterally reduce the claimant's salary by 25%, on 26 January 2022.

Relevant Law, Analysis and conclusion

34. I have jurisdiction to hear this claim by virtue of section 3 of the Employment Tribunal's Act 1996 and the Employment Tribunal's Extension of Jurisdiction

(England and Wales) order 1994. I can hear a contractual claim where it arises or is outstanding on the termination of the employee's employment and relates to damages for breach of the contract of employment.

35. My role is to first determine whether the respondent committed a fundamental breach of contract.

36. I do so by firstly constructing the relevant terms of the claimant's contract of employment and then determining whether the respondent acted in fundamental breach of that contract of employment.

37. I must then go on to consider, if there was a breach, whether the claimant accepted the breach and resigned from her employment as a result.

38. Finally, if I decide the claim of breach of contract is made out, I consider the calculation of damages.

Constructing the claimant's contract of employment

39. I have found that the claimant was entitled to be paid £75,000 per annum by virtue of clause 8 of her contract of employment.

40. I have found that this figure could only be varied if the respondent renegotiated a lower salary level with the claimant as set out in schedule one of the contract of employment. I find that the word renegotiation, in the context of schedule one of the contract, requires a discussion between the parties and agreement. In other words a reduced salary cannot be unilaterally imposed by the respondent.

41. I find that the claimant's contract of employment was not varied lawfully prior to 1 February 2021 and the claimant continued to be entitled to be paid £75,000 per annum by virtue of clause 8 of her contract of employment.

Breach of contract

42. The right to be paid is central to the employment relationship.
43. In *Cantor Fitzgerald International v Callaghan and ors* 1999 ICR 639, CA, the Court of Appeal held that if an employer deliberately withholds or reduces an employee's pay, or diminishes the value of the employee's salary package, that is a fundamental and repudiatory breach of the contract of employment, regardless of the amount involved, either in terms of the size of the amount or the proportion it represents of the overall pay package.
44. A fundamental breach of contract by the employer may be an actual or an anticipatory breach. An anticipatory breach arises when, before performance is due, the employer intimates to the employee, by words or conduct, that they do not intend to honour an essential term or terms of the contract when the time for performance arrives.
45. I find that the email dated 26 January 2021 stated clearly and unequivocally to the claimant that the respondent did not intend to honour the claimant's contractual rights to be paid £75,000 per annum, with effect from 1 February 2021. This is based on a natural and plain reading of what he set out in Kate Perry's email of that date timed at 1131am.
46. I have found as a fact that at no point prior to the claimant's resignation on 1 February 2021 did Kate Perry or anyone else from the respondent retract this statement. The closest the respondent got was to say that if the claimant hit the targets set for the conveyancing department during her notice period, her salary might be paid.
47. The difficulty with this qualified statement is that the claimant was entitled to be paid £75,000 per annum, under a contract of employment, regardless of

whether the conveyancing department hit its targets or not unless a renegotiation of the claimant salary had taken place. This indicated a discussion with the claimant. I have found as a matter of fact that this did not take place.

48. In addition, there is a specific implied term in the claimant's contract that the respondent will not treat her arbitrarily, capriciously or inequitably in matters of remuneration. This forms part of the implied contractual term of mutual trust and confidence. I find that in relying on the alleged shortfall in the conveyancing department's budget to justify not paying the claimant her contractual salary, the respondent was behaving inequitably and arbitrarily. As I have said, the claimant's salary was not dependent on the performance of the respondent's conveyancing department. It is also relevant that the respondent did not take the time, as specifically requested by the claimant, to understand her point of view on the performance of the conveyancing department. It was not clear what the claimant's performance was or that of the conveyancing department at the relevant time.

49. In conclusion, the respondent was in fundamental breach of the claimant's contract of employment on 1 February 2021 because it had provided notice to the claimant that it was not prepared to continue to pay her contractual salary. The respondent was also in breach of the implied term that employers will not treat employees arbitrarily, capriciously or inequitably in matters of remuneration.

Did the claimant accept the breach and resigned from her employment as a result?

50. I have found as a fact that the claimant resigned in response to that breach.

Remedy

What level of damages is the claimant entitled to?

51. The basic purpose of damages is to put the innocent party into the position they would have been in had both parties to the contract performed their obligations according to that contract. This obviously entails compensating a wrongfully dismissed employee by an amount of money equivalent to that which they would have earned had the contract not been wrongfully terminated.
52. Damages must not be too remote from the breach of contract. A type or kind of loss is not too remote a consequence of a breach of contract if, at the time of contracting, it was within the party's contemplation.
53. The simplest way to calculate damages for underpaid wages is to calculate the gross salary from the date of dismissal until the date of the lawful termination.
54. If an employee is contractually entitled to a bonus I can estimate the value of that bonus and include it in any award. If the payment is discretionary this will usually be disregarded for the purposes of damages.
55. Pension loss may make up an important part of an award of damages if an employee is contractually entitled to pension benefits.
56. An employee is under a general duty to try to reduce their losses by taking steps to find another job. Where they are successful the salary and any other benefits earned during the damages must be deducted from the award of damages.

57. I find that the damages which flow from the respondent's fundamental breach of the claimant's contract of employment are the balance of the claimant's notice pay, less any mitigation.

58. In the absence of challenge from the respondent, I accept the claimant's gross salary loss for 20 weeks' pay is £28,846.20, plus a pension contribution of £865.39, as set out in her schedule of loss. This comes to a total of £29,711.59.

59. In mitigation, the claimant has earned £18,054.50 during the period 1 February 2022 to 21 June 2022. I accept this evidence of it was unchallenged by the respondent.

60. £29,711.59 less £18,054.50 comes to a total of **£11,657.09**. The respondent is ordered to pay the claimant this sum on a gross basis. This award is made gross as it is anticipated that the respondent will make the usual deductions for post-employment notice pay from this payment.

61. Turning to the issue of bonus. I find that the claimant did have a contractual entitlement to a bonus as set out in paragraph 3 of schedule one of her contract of employment. In order to trigger this bonus, under paragraph 3 of schedule one of the contract, the claimant needed to demonstrate an invoiced fee level that had exceeded the equivalent of £150,000 per annum, or could reasonably be expected to exceed that level within an acceptable timeframe. This translated to average fees of £12,500 per month.

62. I find that the claimant would not have been able to demonstrate this fee level and therefore would not have been paid a bonus, had the contract not been wrongfully terminated and had she remained in employment up until the conclusion of her notice period.

63. The reason for this is that the claimant did not provide sufficient evidence that her fee level would have exceeded the equivalent of £150,000 per annum, or £12,500 per month, or could reasonably be expected to exceed that level within an acceptable timeframe.
64. The claimant relies on the handwritten notes of the fees that she billed during the eight-month period May 2022 to January 2021 in support of her claim to a bonus. This, the claimant said, showed she had billed £120,465.81 over eight months. This came to an average of £15,058.23 per month during this period. This document is limited to one page of handwritten notes. This document was not supplied to the respondent as part of the disclosure exercise and only emerged during the claimant's evidence.
65. By contrast, the respondent produced evidence in the tribunal bundle that the claimant had billed £93,150 during that same eight-month period, which was an average of £11,643.75 a month. Kate Ike (external accountant) gave clear and cogent evidence about how this figure had been calculated, based on the accounts systems used by the respondent and by reference to matters opened by the claimant. This evidence was not effectively challenged by the claimant in cross examination. I accept this evidence.
66. I also find that, realistically, the claimant would not have made up any shortfall during the remaining weeks of her employment up to the correct termination date. There the claimant did not lead any evidence to suggest that she would have made up any shortfall during the remainder of her notice period. It is unlikely that the claimant would have operated at a higher level during the balance of her notice period and billed more than she had over the previous eight-months.

67. I have therefore concluded that at the point of the claimant's dismissal, the claimant's invoiced fee level had not reached the equivalent of £150,000 per annum, nor was there a reasonable expectation it would do so in the future. Rather, the claimant's projected fee income was at best £139,725 (£11,643.75 x 12). This was not sufficient to trigger the bonus in schedule one, paragraph 3, of the claimant's contract of employment

68. Finally, I do not award damages for the cost of legal advice taken at the time when the salary cut was introduced. I consider this to be too remote to flow from the respondent's breach of the claimant's contract, in all the circumstances. The parties would not have concluded at the outset of the contract that if one was in breach of contract, the other could take legal advice the cost of which the party in breach would be liable for.

[Respondent's breach of contract claim](#)

69. Turning now to the respondent's breach of contract claim. Given the claimant has brought a claim for breach of contract, the same legal principles apply as set out in paragraphs 35 to 38 above.

70. I have found that the respondent was in fundamental breach of the claimant's contract of employment which entitled her to resign and accept the fundamental breach. In these circumstances, I do not find that the claimant acted in breach of contract in resigning during her notice period.

71. Despite this finding, I go on to assess whether the respondent has demonstrated they have suffered loss as a result of the claimant's resignation in February 2022. I begin by observing the respondent did not lead any witness evidence to support their claim that they had suffered any losses

during this period. The respondent has produced a schedule of loss, but no explanation has been provided about how those losses have been calculated. Under cross examination Kate Perry was unable to explain how any of the figures have been calculated in the schedule of loss produced by the respondent.

72. Turning briefly to each head of loss advanced by the respondent. The first is the cost of locum cover to cover existing conveyancing matters in the sum of £38,000. I have found as a fact that the respondent had already provided locum cover prior to the claimant's resignation, and it is not clear how the figures claimed for are therefore connected to the claimant's resignation.
73. The respondent claims for client compensation in the sum of £6,451. Again, it is not clear how this is connected to the claimant's resignation and indeed it is not clear whether these complaints may have happened anyway.
74. The respondent claims for an increase in professional indemnity insurance premium in the sum of £7,202. Again, no documentation has been provided to explain this loss, nor has a clear explanation been provided about how it has been calculated. If the reason for the increase in premium is because the respondent did not have an individual within the firm who was a qualified solicitor, I find that this was not connected to the termination of the claimant's employment. The claimant had given her notice to terminate employment in December 2021 and the respondent should have taken steps prior to February 2022 to find an alternative individual to work at the practice who was a qualified solicitor. The locum solicitor could have been such a person as they are qualified and on the SRA roll. Mr Holmes could also very easily have re-enrolled, prior to February 2022. The claimant's resignation was therefore

not the operative reason for the respondent finding itself in this position, but rather it was its own failure to organise its affairs promptly.

75. The respondent claims loss of income from the conveyancing department in the sum of £21,998. No explanation has been given for how this figure has been calculated or why it is attributable to the claimant terminating her employment.

76. Finally, the respondent claims loss of reputation in the sum of £10,000. Again, no explanation of how this figure has been calculated or why it is attributed to the claimant terminating her employment.

77. In the circumstances I conclude that the respondent has not established it suffered any loss as a result of the claimant terminating her contract of employment early, during her notice period.

78. In all the circumstances, the respondent's counterclaim for breach of contract is not well founded and is dismissed.

Employment Judge Childe

19 July 2023

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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