EMPLOYMENT TRIBUNALS

Claimant: **Mr Christian M R Bozeat**

Respondent: **Macom GmbH UK Ltd**

Heard at: **London Central (sitting virtually)**

On: **4-6 July 2023**

Before: **Employment Judge Wright**

Representation:

Claimant: In person

Respondent: Mr Ali (of Counsel)

JUDGMENT having been sent to the parties following the hearing 4-6 July 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 ("ET Rules"), the following reasons are provided:

REASONS

Summary of the claim

1. The Claimant brought a claim dated 6 June 2022 in the London Central Employment Tribunal for unfair dismissal, wrongful dismissal/notice pay, breach of contract, holiday pay and arrears of pay/other payments. By Judgment of Employment Judge H Grewal dated 14 February 2023 it was determined that the tribunal only had jurisdiction to hear the claim of unfair dismissal.

2. The background to this case is summarised in the facts section of the Employment Tribunal's Judgment dated 14 February 2023 at paragraphs 9 –13 (page 58-59 of the electronic bundle) and the historical background to the dispute between the parties is summarised in the High Court Judgment of Judge Hodge QC at paragraphs 1 –21 (page 149- 158).

3. The Respondent's Counsel brought to the tribunal's attention the fact that county court proceedings had recently been served related to the Claimant's company car leased whilst he was Managing Director of the Respondent. It was decided that this hearing could still go ahead in respect of liability and agreed by all parties that remedy should be carved out to avoid any potential issues with overlap with the county court proceedings.

4. As it then transpired, the Claimant's cross-examination ran into day two of the hearing and Counsel had significant technical issues in respect of his internet connection. This prevented Counsel from being able to conclude his cross-examination of the Claimant on day two as planned, this meant that cross-examination of the Claimant ran into the final day of the hearing and that there would have been insufficient time to deal with remedy in any event.

5. One other point to note in respect of the hearing is that the Respondent's witness remained under oath overnight between the first and second day of the hearing. Counsel informed me on the morning of day two that the Respondent witness had unfortunately contacted him and his instructing solicitor overnight whilst still under oath and unable to discuss his witness evidence. He confirmed that neither had replied. Given the position and the fact that cross-examination was due to conclude shortly, I confirmed that I did not intend to take any further action in respect of this but would record the same.

List of Issues

6. The issues to be determined by the tribunal were as follows:

Unfair dismissal

7. What was the reason or principal reason for the Claimant's dismissal?

7.1 The Respondent says some other substantial reason (SOSR) capable of justifying dismissal, that being the Claimant, whose job title was Managing Director, having been made bankrupt on 23 March 2023 and the breakdown of the relationship.

7.2 And in the alternative, misconduct.

8. Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

9. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

10. If so, should the Claimant's compensation be reduced? By how much? The Respondent argued for a 100% 'Polkey' deduction'.

11. If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

12. If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion? The Respondent argues for a deduction of 100%.

13. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply (relevant only if the Claimant was not dismissed for SOSR)?

14. Did the Respondent or the Claimant unreasonably fail to comply with it?

15. If so, is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

Relevant Law:

Unfair dismissal

16. The relevant sections of the Employment Rights Act 1996 ('ERA 96) the Tribunal considered were as follows:

17. Section 95 which confirm the circumstances in which an employee is dismissed.

    (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if) —

        (a) the contract under which he is employed is terminated by the employer (whether with or without notice).

18. Pursuant to section 94 an employee has the right not to be unfairly dismissed by their employer. Whether or not an employee has been unfairly dismissed is

determined in accordance with section 98 (1): In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

19. Section 98:

(2) A reason falls within this subsection if it —

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

Summary of the evidence

20. The Claimant attended to give evidence as did Mr Kottke (Director of the Respondent). I considered the evidence given both in written statements and sworn oral evidence.

21. I was provided with a bundle of 837 pages. I considered the pleadings together with relevant documents pointed out to me in the hearing bundle. In respect of

this the Claimant produced a list of relevant documents during an adjournment on the first day of the hearing. The Claimant also provided a written skeleton argument and the Respondent's Counsel provided copies of two authorities that he wanted me to consider: Moore v Phoenix Product Development Ltd UKEAT/0070/20 (20 May 2021, unreported) and Cobley v Forward Technology Industries plc [2003] EWCA Civ 646. Both parties also gave oral submissions. I made the following findings of fact:

Relevant finding of fact

22. The Claimant was employed and Managing Director of the Respondent from 5 July 2016 –24 March 2022.

23. On 23 March 2022 the Claimant was made bankrupt by way of a bankruptcy order. On the same day, the Claimant's work emails were cut off without any communication to him that this had occurred or any explanation for doing so, a fact accepted by Mr Kottke. The Claimant emailed Mr Kottke from his personal email address regarding the fact that he could not gain access to his computer or emails and received no response. The Claimant also gave evidence that he had communicated with another employee who had confirmed that they could receive but not send emails, which the Claimant took as an indication that there was an issue with the wider email system. This evidence was accepted. The Claimant, being used to handling all practical aspects of running the Respondent company (a small company) including its IT, and with no explanation for the ongoing issues being provided by Mr Kottke, attempted to restore his emails. The impact of this was that none of the Respondent's email addresses were reachable. Mr Kottke therefore had to spend time migrating all emails to a new domain not controlled by the Claimant.

24. The Respondent confirmed in the grounds of resistance (paragraph 20 page 48 of the electronic bundle) that the deactivation of the Respondent's email address domain was viewed as gross misconduct and formed part of the reason for the Claimant's dismissal. I was invited by the Respondent's Counsel to find that the Claimant knew that this would cause disruption, that this was an act of gross misconduct and/or deliberate sabotage by the Claimant and to find that the Respondent had acted reasonably in treating it as gross misconduct and acted reasonably in treating it as part of the reason for his dismissal or that a deduction of 100% should be made for contributory fault to any compensation award otherwise made for unfair dismissal. I declined to do so.

25. In Mr Kottke's witness statement he confirmed that "conduct" in respect of issues over the company's domain name and emails not being received was just one aspect of the decision to dismiss the Claimant, and in cross-examination stated

that the issue with the domain was why the Claimant's dismissal was with immediate effect, saying that he had of course considered whether to suspend the Claimant.

26. Mr Kottke, as confirmed in cross-examination, had not informed the Claimant of the fact that he had been deliberately cut off from the Respondent's system, he made no contact with the Claimant with regards to the action the Claimant had taken, nor to ask him why or to request the password for the online administration portal. Mr Kottke reached the conclusion that this was a deliberate act of sabotage by the Claimant based on the confirmation from the Respondent's IT provider that the Claimant had made the change. I do not consider, in the circumstances, and based on the information that Mr Kottke had, that this conclusion was in the range of reasonable responses for the Respondent to come to. The Claimant confirmed that the external IT company did in fact have access to the domain as he had provided this previously to them and, in any event, he would have been willing to provide the password had he been asked. I accept this evidence. Had Mr Kottke communicated to the Claimant confirming that he had been deliberately cut off from his emails and blocked from the system and the Claimant had then taken this action, the position would be different.

27. The Claimant gave evidence that on the morning of 24 March 2022 he had spoken to one of the Respondent's employees and been informed that they had all been emailed on 23 March 2022 confirming that the Claimant had ceased working for the Respondent. It was accepted that this was what the Claimant had been told by the employee. This conversation was after the Claimant had taken the above action to restore his emails.

28. By letter dated 24 March 2022 the Respondent dismissed the Claimant. Mr Kottke gave evidence that the letter of dismissal was prepared in advance of the Claimant's bankruptcy and that this, as drafted, was being sent regardless of the above event. This dismissal letter summarily dismissed the Claimant.

29. The relevant extract from the letter stated:

'The effect of the bankruptcy order renders you unable to perform your existing role. Notwithstanding the bankruptcy order, because of your egregious behaviour throughout the recent litigation and business dealings with your fellow shareholders/director you will not be surprised that no trust whatsoever remains between the parties as you have irreparably and terminally undermined it. I therefore write to confirm on behalf of macom GmbH (UK) Ltd. That you are dismissed from your employment with immediate effect. In the circumstances it would be futile to hold a formal disciplinary hearing and afford you the

opportunity to state your case because there is absolutely nothing you could possibly say which would have any prospect of re-establishing our trust in you.'

30. I found the issue with the domain name was not the principal reason for the Claimant being dismissed and was not the reason for him being dismissed without following any procedure.

31. Mr Kottke in his witness statement stated that he was of course aware of HHJ Hodge KC´s Judgment and the order to work together with the Claimant for the benefit of the Respondent (pages 147 – 184) of the electronic bundle which he respected.

32. Mr Kottke confirmed that prior to the Bankruptcy order the Claimant had not been disqualified as a Director and that *'he was not prevented from promoting and managing any UK-company, so whilst it was very difficult to work together, we were ordered to do so and I adhered to this order'*.

33. Mr Kottke confirmed in answers to questions that he had found the Claimant difficult to work with and that this had been the case for a number of years, and from shortly after they had started to work together. He considered that the Claimant wanted things done his way and that the Claimant's agenda was what best suited his financial interests.

34. Following the High Court Judgment in which the Judge ordered the parties to work together and set out at a high level how this was to be done, Mr Kottke said, during cross-examination, that he did not accept that the Claimant was trying to do this and Mr Kottke confirmed that he himself was doing exactly what had been ordered by the Judge *"no-more, no-less".* This included, he states, being prepared to attend Directors' meeting and actively ensuring that these were taking place at least every 2 months, but that he was not prepared to have meetings 'weekly', which he considered was what the Claimant was trying to do. He stated in cross-examination that the relationship could be "built" by the Claimant replying to his emails and providing him with information that he had requested. I was pointed to email evidence concerning the Claimant contacting Mr Kottke for assistance with a tender which was to be submitted on the last day of the High Court trial, and there is clear evidence of Mr Kottke refusing to assist with this despite it being in the interest of the Respondent company and this approach persisted after the trial.

35. The Claimant's cross-examination of Mr Kottke largely concentrated on Mr

Kottke's independence from the associated German company and whether he was conflicted in his role, given that he mainly worked for and was paid by the German company and additionally was a Director receiving some payments from the UK Company. Mr Kottke continually confirmed that he did not consider that he was conflicted and maintained that, whilst he had taken legal advice on the decision to dismiss the Claimant, that he was the decision-maker. I accept Mr Kottke's evidence that he was the decision-maker.

36. In Counsel's cross-examination of the Claimant in respect of the working relationship, he concentrated on a breakdown of the relationship stating that, regardless of who was at fault for this, would the Claimant agree that there was a breakdown in the relationship? The Claimant was firm in his response that the relationship was difficult but workable and that he had made efforts to work with the Respondent as demonstrated in emails.

37. Counsel pointed to actions taken by the Claimant to push through company accounts in an unreasonable manner and timeframe despite knowing that Mr Kottke was away, and there being a period of several months to finalise these – and therefore no reason to act in the manner he did. Counsel put it to the Claimant that the reason why he had pushed this through was to get the company car he had leased approved. There was a discussion over the authority of the Claimant to have leased the car, but I make no findings of fact regarding this, given the County Court claim. I found that there was clearly a disagreement over the Claimant's authority to lease the car and that the Claimant's solution to this stalemate was to push through the accounts. I found this to be reprehensible and evidence of a difficult working relationship. I was also pointed to emails within the bundle demonstrating discourteous and unprofessional behaviour from Mr Kottke to the Claimant and also from Mr Salzar to the Claimant.

38. I found that Mr Kottke acted in a way he considered to be to the letter of the High Court Judgment *'no more, no less'* and that his reference in emails of *'not my job'* to demonstrate that he was not working with the Claimant for the benefit of the Respondent company. I found his actions in cutting off the Claimant's emails without any communication, refusing to respond to the Claimant when he queried this, and his communication to the Respondent's employees in advance of the Claimant, regarding the Claimant's standing within the Respondent company to all be reprehensible.

39. Counsel also cross-examined the Claimant regarding how he could continue to work for the Respondent when he had been removed as a Director. The Claimant pointed out this did not mean that his employment automatically came to an end, gave evidence of how he had continued to work for the Respondent

and generate leads even whilst subject to the bankruptcy proceedings, that his primary duties were sales, he considered himself a good salesman, he was the only person doing this and that it was in his interest, given his wife was still a shareholder, for the Respondent company to succeed.

40. It was not in dispute that the Claimant could be removed as a Director but there was nothing that I was pointed to that would have meant that his employment automatically terminated as an employee in respect of being removed as a Director.

Submissions

41. I was addressed by Counsel on SOSR (being bankruptcy and trust and confidence). Pointed to the following authorities:

(1) Moore v Phoenix Product Development Ltd UKEAT/0070/20 (20 May 2021, unreported).

(2) Cobley v Forward Technology Industries plc [2003] EWCA Civ 646.

42. Counsel also stated that it was relevant that the Claimant had been made bankrupt by the majority shareholders, rather than a situation where the Claimant's bankruptcy was by an unrelated party.

Conclusion

Unfair dismissal

43. I accept that the relationship was difficult, and I found that the reason for dismissal was SOSR – that being both the Claimant's bankruptcy and the difficult working relationship, and find together these constitute SOSR and are substantial and accordingly a potentially fair reason for dismissal.

44. I found that that the Claimant did make efforts post the High Court Judgment to work with Mr Kottke, demonstrated by emails showing him providing information that Mr Kottke requested – an example being him providing information requested related to the Respondent's I.T. infrastructure.

45. However, the relationship between the Claimant and Mr Kottke in particular, does need to be considered in the context of Mr Kottke's admissions of sticking to what he had to do regarding the court order *'no more, no less'* rather than complying with the spirit of it and in effect, being deliberately difficult.

46. Whilst I remind myself that the tribunal is not to substitute its own view for that of the Respondent's, owing to the manner of the Claimant's dismissal, I found that the Respondent's decision to dismiss fell outside the range of reasonable responses. I confirmed to the parties that I was concerned regarding Mr Kottke's attitude and behaviour in working with the Claimant post the High Court Judgment and that he was both 'judge, jury and executioner' in respect of the decision that there was an SOSR reason. There was no procedure at all followed and, even though the Claimant requested it, there was no appeal offered with someone independent.

47. To reflect the likelihood of the Claimant having been fairly dismissed had a fair procedure been followed (given his bankruptcy and the impact this had on him being able to be a Director), I made a 'Polkey' deduction of 60%. I declined to make any deduction in respect of contributory fault because, whilst I found that there had been unprofessional conduct from both parties which had contributed to a difficult working relationship, this same conduct in respect of the Claimant had already been considered when making the above deduction, and to make a further deduction would have resulted in a double deduction on the same findings of fact and would not have been just and equitable.

48. I considered that the Claimant's case can be distinguished from the authorities that Counsel referred me to because, in this case, there was no automatic termination of the Claimant's employment on him being made bankrupt. Following a fair procedure is normally required to render a dismissal fair and I considered it particularly necessary in this case given the circumstances surrounding the relationship between the Claimant and Mr Kottke. I do not accept, in the circumstances of this case, that it was reasonable to conclude a procedure would have been futile.

49. Whilst I acknowledge that that the ACAS code does not apply to such dismissals (see note below) as the Respondent had greater discretion over what process is fair and reasonable, the principles of natural justice still apply. I still found that the Respondent's failure to follow any form of fair procedure in the circumstances of this case rendered the Claimant's dismissal unfair on procedural grounds.

NOTE:

Whilst not forming part of the Tribunal's oral judgment as sent to the parties on 19 July 2023, I expressed at the time my **preliminary** view that a 10% uplift for failing to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures (ACAS Code) should be applied to any compensation awarded. This view was given to

assist the parties in their attempts to reach an agreed compensation sum and avoid the need for a remedy hearing. However, having heard the parties' views and considered this matter further in preparing these written reasons, that provisional view has changed. Given that the Tribunal concluded that the Claimant was dismissed for some other substantial reason (SOSR), it does not appear that the Tribunal would have the power under section 207A Trade Union and Labour Relations (Consolidation) Act 1992 to uplift any award for a failure to comply with the ACAS Code - see Phoenix House Ltd v Stockman 2017 ICR 84, EAT.

Employment Judge Wright

Dated 13 September 2023

WRITTEN REASONS SENT TO THE PARTIES ON

15/09/2023

FOR EMPLOYMENT TRIBUNALS