



EMPLOYMENT TRIBUNALS

Claimant: Mr G Badby

Respondent: Aura Heritage Limited

HELD AT: Manchester (in person) **ON:** 26 September 2023

BEFORE: Employment Judge Peck (sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Mr Young (Director)

JUDGMENT

1. The respondent was not in breach of contract. There was a valid waiver of the remainder of the claimant's notice period, as mutually agreed between the respondent and the claimant and the claimant received his notice pay up to 30 November 2022.
2. The claimant's breach of contract claim therefore fails and is dismissed. The claimant is not entitled to an award of damages.
3. Given the mutual agreement that had been reached between the parties, the respondent's employer contract claim was not outstanding when the claimant's employment ended.
4. The respondent's employer contract claim is therefore also dismissed. The respondent is not entitled to an award of damages.

REASONS

Introduction

1. This was a final hearing taking place in person on 26 September 2023, with a reserved Judgment. The parties were notified that a decision would be made in chambers on 10 October 2023.
2. By a claim form presented on 6 February 2023, the claimant complains that he is owed notice pay by the respondent. In his claim form he states that he was *“given 3 months notice only got paid 1 month forced to resign under duress by a particular director owed 2 months + 13 days”*. As clarified at a preliminary hearing before Employment Judge Dilks on 9 June 2023, he says that his contract provided for 3 months’ notice pay but he only received 4 weeks’ pay for the period until the end of November 2022. He says that there was an agreement on 25 November 2022 that he would resign and be paid up to 30 November 2022 only, but that he was under duress at the time.
3. The claimant commenced early conciliation on 29 November 2022 and received an ACAS early conciliation certificate on 10 January 2023.
4. By a response form, the respondent resists the complaints and brings an employer’s contract claim (**ECC**) (with case number 2405125/2023, to be heard together with the original claim, as per Employment Judge Batten’s direction dated 26 April 2023). The respondent denies that the claimant was entitled to any outstanding notice pay. Its position is that the claimant, having been given 3 months’ notice of termination, resigned with immediate effect prior to the expiry of this notice period. It says that the claimant indicated that he would do so *“on the proviso the company did not pursue the significant sums it was owed due to his actions which amounted to a gross breach of trust and fraud”*. The basis of its ECC against the claimant is that it says it was owed £8,014.55 by the claimant due to the claimant submitting false time records for himself and countersigning false time records for others.

Issues

5. The issues to be determined by the tribunal had been discussed and agreed at a preliminary hearing on 9 June 2023.
6. The issues to be determined were therefore:

Notice pay

- a. What was the claimant’s notice period?
- b. Was the claimant paid for that notice period?
- c. What was agreed between the parties in terms of notice pay on 25 November 2022 and in what circumstances?

- d. Was there a waiver of the notice period?
- e. If not, how much should the claimant be awarded as damages?

Employer's contract claim

- f. Was the claim outstanding when the claimant's employment ended?
 - g. Did the claimant falsely claim for time worked and gain financial benefit as a result?
 - h. Did the claimant knowingly countersign documents enabling others to also claim for time not worked?
 - i. Did those actions amount to a breach of the implied term of trust and confidence?
 - j. Did those actions breach another term of the contract?
 - k. How much should the respondent be awarded as damages?
7. As observed by Employment Judge Dilks, if the respondent succeeds in its defence of the claimant's claim – on the basis that there was a binding agreement between the parties that the respondent would accept the claimant's resignation, pay him for the month of November and not pursue him for sums allegedly owed to the respondent – the logical consequence is that the respondent cannot proceed with its ECC against the claimant. This is because it cannot be said to be outstanding on termination of the claimant's employment, if a term of the agreement reached with the claimant was that the respondent would consider its potential ECC against the claimant as having been resolved.
8. For clarity, however, this does not mean that the legal position is such that an ECC can only succeed if there is a successful breach of contract claim by an employee as discussed and clarified with the parties at this hearing. An ECC is not limited by the amount of the employee's original claim and can still proceed irrespective of the outcome of the employee's original claim, provided it has otherwise met the requirements of a valid ECC (**Conway v Comms People Ltd UKEAT/388/01**).
9. In addition to the above issues, a preliminary matter was addressed at the outset of the final hearing, namely the claimant's position in response to a letter from the tribunal dated 7 September 2023, in which it was noted that:

"The tribunal does not appear to have received a defence from the claimant to the respondent's employer contract claim (ECC). The ECC is set out in section 7 of the respondent's response to the claimant's claim. The claimant was due to send his defence to the ECC within 28 days of the claimant being sent the response with the Tribunal's letter dated 26 April 2023. If the claimant has filed a defence to that claim he is asked to re-send it as soon as possible.

If no defence to the ECC has been sent by the claimant yet he will need to send a draft defence to the ECC and apply for an extension of time for filing it. He must do so by 15

September 2023, copying the application to the respondent. He must explain why he did not file the defence to the ECC in time. Unless he makes that application for an extension of time and it is granted, judgment can be given in favour of the respondent on the ECC. If an application for an extension of time is made, it will be decided at the start of the final hearing on 26 September 2023.”

10. I discussed this letter and its contents with the claimant. He confirmed that he had received the letter and read it. He also acknowledged that he had not provided a response and that he had therefore failed to file a formal defence to the respondent’s ECC. The explanation that he provided was that he had understood that, in correspondence referring to the respondent’s ECC (and the requirement to respond to the respondent’s ECC), the respondent was the “claimant”, and he was the “respondent” and that it was therefore not an instruction for him to take action.
11. I was not entirely satisfied with this explanation and consider the contents of the tribunal’s letter dated 7 September 2023 to be clear. Even if there was confusion on the part of the claimant regarding terminology, the letter clearly required a response to be provided the *employer’s* contract claim and the claimant should therefore have known that this must have meant a response to Aura Heritage Ltd’s claim (ie the respondent).
12. I carefully considered, however, the power afforded to me by rule 6(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the **Tribunal Rules**) to waive or vary the requirement to comply with any order of the tribunal. Having done so, and having regard to the overriding objective set out at rule 2 of the Tribunal Rules, I decided that I would not issue a default judgment against the claimant in respect of the respondent’s ECC, nor would I restrict the claimant’s participation in the hearing (rule 20). I took into account the fact that the claimant is a litigant in person; that the claimant had set out his position in response to the respondent’s ECC at the preliminary hearing on 9 June 2023; that the evidence relevant to the respondent’s ECC would in any event need to be considered as part of the claimant’s breach of contract claim; and that the respondent is aware of what the claimant’s position is in response to its ECC. I felt that this approach would enable the case fairly and justly.

Procedure, documents and evidence

13. There was a hard copy bundle of documents, prepared by the respondent, which included the record of the preliminary hearing on 9 June 2023 (at pages A – H), the pleadings and other relevant documents (at pages 1 – 89).
14. At the outset of the hearing, Mr Badby explained that he had only received the hard copy bundle on the morning of the hearing. I noted, however, that I believed that Mr Badby had already had sight of the documents included in the bundle. The bundle

included the pleadings and tribunal correspondence (at pages 1 – 36 and pages 67-68); Mr Badby’s schedule of loss (at page 37); Mr Badby’s witness statement (at page 38 – 40); “exhibits” previously submitted (as I understood it from the file, by Mr Badby) to the tribunal electronically in advance of the preliminary hearing on 9 June 2023 (at pages 41 – 62); Mr Jamieson’s witness statement (at pages 63 – 66); a number of invoices (at pages 69 – 88); and a letter from the respondent to the claimant dated 25 November 2022 (at page 89, a duplication of page 57).

15. In any event, I afforded the claimant an opportunity to consider the bundle contents during a break in proceedings before I began to hear evidence and asked that he bring to my attention any concerns that he might have about documents included in the bundle. The claimant did not raise any such concerns.
16. There were witness statements for both witnesses, which had been prepared and exchanged in advance.
17. At the hearing, I heard evidence from the claimant for himself.
18. I heard evidence from Mr Jamieson (Director) for the respondent.
19. I heard oral submissions both parties after hearing the oral evidence.

Law

Breach of Contract

20. At common law, every employee is entitled to notice of the termination of his or her contract of employment, regardless of how long he or she has worked for the employer. The only exception is where one side has broken a fundamental term of the employment contract, thereby repudiating it, in which case the other side has an option to terminate immediately. This will be the case if the employee commits an act of gross misconduct. If the employee was not in fundamental breach of contract, the contract can only lawfully be terminated by the giving of notice in accordance with the contract or, if the contract so provides, by a payment in lieu of notice.
21. The amount of notice that must be given by either party will normally be found in the express terms of the contract.
22. If there is no expressly agreed period of contractual notice, there is an implied contractual right to reasonable notice of termination. This must be not less than the statutory minimum period of notice set out in section 86 Employment Rights Act 1996. For someone who has been employed for at least one month but less than two years, this is one week’s notice.

23. When an employer or employee wishes to change the terms and conditions of an employment contract, including those relating to notice, it can do so by mutual agreement. An express variation may be made either orally or in writing, although strong evidence of there being a mutual agreement to vary will be required to establish that terms have been lawfully varied.
24. An employee must have agreed to any changes voluntarily and consent will not be valid if required through duress. For there to be duress in the legal sense, however, there must be “no real alternative” available to the employee but to accept the proposed variation (**Hepworth Heating Ltd v Akers and ors EAT 846/02**).
25. When considering the terms of a contract, as per Lord Hoffman in **Investors Compensation Scheme Ltd v West Bromwich Building Society (no. 1) 1998 WLR 896, HL**, it should be interpreted in line with the meaning it would convey to “a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract”.
26. A failure to give proper notice will amount to a breach of contract, and in the case of a failure by an employer, will give rise to a claim for damages for wrongful dismissal.

Employer’s Contract Claim

27. Employers are not able to bring free-standing breach of contract claims against former employees in the employment tribunal. They are restricted to the right to make a counterclaim in those cases in which a former employee brings a breach of contract claim against them (Article 4(d) Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994). An employer may bring proceedings before an employment tribunal for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries).
28. For a tribunal to hear a contractual claim brought by an employer, the claim must:
 - a. Be a claim that a court in England and Wales would have jurisdiction to hear and determine.
 - b. Not be excluded.
 - c. Arise or be outstanding on the termination of the employment of the employee in question.
 - d. Be for one or more of the following:
 - i. damages for breach of a contract of employment or any other contract connected with employment;
 - ii. the recovery of a sum due under such a contract;
 - iii. the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract.

29. Under the Tribunal Rules an employer's contract claim must be presented to the tribunal "as part of the response, presented in accordance with rule 16" (rule 23) and in the same way that a respondent has the right to submit a defence to a claimant's claim, a claimant has the right to submit a defence to an employer's contract claim.
30. The claimant's response to his or her employer's contract claim must be presented to the tribunal within 28 days of the date on which the ET3 was sent to him or her.

Findings of Fact

31. In making my findings of fact, I have taken account of the witness statements, the oral evidence and the documents that I have been provided with.
32. It is my observation that the witness evidence given by both the claimant and Mr Jamieson was, to a greater or lesser extent, inconsistent with that set out in their respective witness statements. For example, the claimant makes no mention at all of the telephone call with Mr Jamieson on 25 November 2022, which it is not in dispute is the call during which the claimant resigned (he says under duress, the respondent says voluntarily). Mr Jamieson, however, describes that discussion in his witness statement but makes no mention of the claimant proposing that he be paid 6 weeks' pay to bring matters to a close, which is evidence he gave during cross-examination.
33. I recognise that neither party is professionally represented, which may explain why some facts have been omitted from the witness statements. I have, however, considered the witness evidence as a whole with some caution and assessed this carefully in the context of the contemporaneous documents.
34. Where there was a conflict of evidence, I have determined it on the balance of probabilities.
35. I have also elected to make my findings of fact relevant to issues (a) – (e) and a determination of those issues, before making detailed findings of fact relevant to issues (f) – (k) on the basis that, as per paragraph 7 above, the respondent's ECC shall fall away if the claimant's breach of contract claim is dismissed.

Claimant's employment with the respondent

36. The respondent specialises in the conservation and restoration of historic and listed buildings and provides on-site services to various clients across the country.
37. The claimant commenced employment with the respondent on 4 May 2021.

38. He was employed as a Project Manager and the terms and conditions of his employment were set out in a contract of employment, signed by the respondent on 6 May 2021 and by the claimant on 7 May 2021 (the **Contract**).
39. The Contract provided that the claimant was entitled to 3 months' notice from the respondent ("on successful completion of his probationary period but less than 5 years' service") and was required to give 3 months' notice to the respondent ("on successful completion of your probationary period"). Under the Contract, the respondent reserved the right to give a pay in lieu of notice (or part notice).
40. The Contract also provided the claimant with 12 weeks' contractual sick pay in any rolling 12-month period.
41. The claimant's contractual hours of work, as set out in the Contract, were 42.5 hours per week, working from 730am to 430pm each day (with a 30-minute break). On his evidence, however, the claimant did not work his contractual hours and would finish work and leave site between 245pm and 315pm each day. I therefore find that the claimant was not complying with the terms of his contract in term in this respect.
42. The claimant was paid a salary of £40,000 per annum, payable monthly.
43. In his role as a Project Manager, the claimant was responsible for supervising a site at which the respondent was undertaking construction and restoration work for a client of the respondent. He opened and closed the site each day. His responsibilities also included supervising sub-contractors engaged by the respondent and he was responsible for signing off invoices submitted by these sub-contractors on a fortnightly basis. Mr Jamieson counter-signed the invoices signed off by the claimant and on his evidence he did so, trusting the claimant to have only signed off valid invoices.

Conduct discussion: 13 June 2022

44. On 13 June 2022, a meeting took place with the claimant, described as an "investigation meeting". The meeting minutes, the contents of which were unchallenged by the claimant, record that concerns about the claimant's timekeeping were discussed with him at this meeting. It was explained that the respondent's client had raised concerns that there was no-one on-site at 230pm on the previous Friday and having checked the claimant's vehicle tracker, the respondent identified that the claimant had left the site before 4pm on numerous occasions. The claimant did not dispute this at the time, but explained that by 230pm he was in pain with his knee.
45. I find that it was agreed at the end of the meeting that the claimant would work his contracted hours going forwards and would contact the office in the event that he needed to leave site early.

Conduct discussion: 11 November 2022

46. A further meeting with the claimant took place on 11 November 2022, this time in the form of a disciplinary meeting.
47. The meeting minutes, the contents of which were unchallenged by the claimant, record that concerns about the claimant's timekeeping were again discussed with him and the impact that him leaving site early was having on the respondent's contract with the client was also considered.
48. At this meeting, the claimant did not challenge the assertion that he was leaving site early, which is consistent with the evidence given by the claimant at this hearing. Nor did he dispute that staff were leaving the site early, as recorded by CCTV footage. His explanation, however, for the project running behind schedule was not the fact that staff were leaving site early, but that he required more resource. The respondent's response to this was that it had provided the claimant with more resource. I find that at the end of this meeting, the claimant was advised to consider what he wanted to do, the respondent having said to him that site management might not be working for him.
49. On 14 November 2022, however, the respondent wrote to the claimant and informed him that his employment was being terminated on 3 months' notice because of him having left site early. In its letter, the respondent stated that *"This has resulted in all operatives, including yourself to be paid for hours not worked. A preliminary investigation shows lost time on site to approximately equate to 14 weeks in man-hours. This has led to a significant financial burden on the company in terms of overpaid wages and delay to the contract. The reputational damage to the company is also significant. The company alleges that these matters, if proven, represent a gross breach of trust"*.
50. I therefore find that on or around 14 November 2022, the claimant was aware that the respondent had taken the decision to terminate his employment and was also aware that an investigation was being undertaken into potential payments to him (and other staff) for hours not worked.
51. The claimant was offered the right of appeal, which he accepted in evidence he was aware of, but did not exercise this.

Claimant's sickness absence – 14 November 2022 onwards

52. On 14 November 2022 the claimant commenced a period of sick leave and he remained absent from work due to sickness until the termination of his employment.

Telephone discussion: 25 November 2022

53. It is not in dispute that a telephone call between Mr Jamieson and the claimant took place on 25 November 2022. The claimant initiated this call. Mr Jamieson was on holiday at the time.
54. It is not in dispute that, during this call, there was a discussion about the claimant's notice pay and termination of his employment.
55. However, there is a dispute about what was, or was not, agreed during this call and also the chronology of events. The claimant also disputes that there was any mention of the respondent's ECC during this call, or that it was put to him that if he resigned the respondent would not pursue any claims against him.
56. In terms of relevant documents, I had sight of the following:
 - a. An email sent at 12:38 on 25 November 2022, from the claimant to the respondent stating: *"Take this email as my resignation please"* (page 55).
 - b. A letter dated 25 November 2022, from the respondent to the claimant, which stated *"following an investigation...it has become evident that you have been overpaid for un-worked hours and a number of labour only operatives have been overpaid, having submitted invoices authorised by you..."* It further stated that he owed the company £8,014.55 for 360.76 hours which the respondent considered the claimant had fraudulently claimed. The letter advised the claimant that the amount would be deducted from his contractual sick payments during his notice period and that he would therefore be paid statutory sick pay only during his sickness absence, going on to say *"..should you return to work then this will be deducted from your monthly salary in equal instalments. If you decide you no longer wish to work your notice period, we are aware there will be no outstanding monies owed to you for us to deduct from and will accept your resignation without pursuing the matter further"* (page 57).
 - c. A letter from the respondent to the claimant, dated 25 November 2022, which stated *"Further to your verbal resignation today stating you will no longer be working your notice period, I am writing to confirm that the company accepts your resignation with immediate effect. Your last day of service is 25th November 2022. As your resignation was given verbally, we would be grateful if you could put this in writing and send this into us immediately. Your final pay up to and including 30th November 2022, will be paid today and your P45 will be issued to your home address under separate cover"* (page 56).

57. In his evidence to this tribunal, the claimant accepted that he received the letter dated 25 November 2022, but he stated that he had not received this prior to speaking to Mr Jamieson. He said that he was prompted to contact Mr Jamieson because he had not been paid on 25 November 2022 when he should have, which was the usual date for payment of wages.
58. I do not make a finding of fact to this effect. Firstly, the only evidence before me in support of the claimant's assertion that he had not been paid on 25 November 2022 when he should have been, is the claimant's oral evidence at this hearing. Mr Jamieson's evidence is that employees did not always get paid on the 25th of the month. The Contract does not specify a payment date. And the claimant's witness statement makes no reference to him having not been paid on 25 November 2023, but states that he raised a question about pay only once his resignation had been accepted. On the evidence before me, I find that it is more probable than not that the claimant became aware that he was to receive SSP only during his notice period, which I find that he became aware of on receipt of the letter dated 25 November 2022 (at page 57). This is consistent with the claimant's position at the preliminary hearing on 9 June 2023, when he particularised his claim further and said that he had been to the doctors and when he provided a sick note he received an email saying he would only receive SSP.
59. It is not in dispute that the claimant initiated the call with Mr Jamieson. It is not in dispute that the call was a heated one, during which the claimant's wife swore and was arguably abusive towards Mr Jamieson, with Mr Jamieson and the claimant both giving evidence to this effect.
60. It is also not in dispute that, at the end of the call, it had been agreed that the claimant would be paid his November salary (up to 30 November 2022) and that he would resign from his employment.
61. To the extent that the contents of the call are otherwise in dispute and on the balance of probabilities, I accept the evidence of Mr Jamieson. I find that during the call, when faced with the prospect of receiving only SSP during his notice period and at a time when the claimant was aware of the respondent's potential ECC (as per my findings of fact at paragraphs 50 and 57), the claimant offered to tender his resignation in return for being paid in full for November and for the respondent not pursuing him for the monies allegedly owed to it.
62. I do not find that the claimant was under duress in agreeing to waiver his remaining notice pay entitlement.
63. In forming my view and making findings of fact about the discussion on 25 November 2022, I take account of the following:

- a. Agreeing not to pursue the claimant for the monies allegedly owing to it was already in the respondent's contemplation prior to the call, as per its letter of 25 November 2022.
 - b. The contemporaneous documents are consistent with this being the agreement that was reached. The claimant sends an email tendering his resignation, consistent with an agreement having been reached. The respondent sends a letter referring to the claimant's verbal resignation, requesting that he confirm this in writing. The respondent informs the claimant that he will be paid up to 30 November 2022 and that he will be paid on that day.
 - c. The claimant is paid for the period up to 30 November 2022, on 25 November 2022, as per the letter and consistent with what had been agreed.
 - d. The respondent takes no further steps, prior to formal proceedings being issued against it, to recover the sums allegedly owed to it by the claimant, consistent with what had been agreed.
 - e. The claimant provides no reasonable and/or consistent explanation as to why he felt that he was subject to duress. In his witness statement he states that he had no alternative but to hand in his notice because of the amount of "*pressure and duress I felt I was under whilst on the sick*" (ie before the call on 25 November 2022). He does not explain what the pressure and duress during this period was. In his oral evidence, however, the claimant stated that Mr Jamieson bullied him into resigning during the call on 25 November 2022, of which there is no mention in his witness statement. He further stated that he believed that if he had not resigned on 25 November 2022, he would not have got paid, so he had no choice and was therefore under duress. He could not, however, explain why he thought that he would not get paid. He makes no reference in his witness statement to a fear of not being paid prompting him to resign. Instead, his witness statement says that he questioned his pay only after he had resigned.
 - f. The claimant initiated the call with Mr Jamieson, accompanied by his wife, which is not indicative of someone being put under duress.
 - g. The claimant makes no reference to being under duress in his resignation email.
 - h. The claimant does not respond to the respondent's letter of 25 November 2022, to challenge its contents or to raise concern about being under duress.
64. The claimant's employment terminated on 25 November 2023.

Decision and Reasons

Notice Pay

What was the claimant's notice period?

65. As per my findings of fact, the claimant's notice period as set out in the Contract was 3 months.

Was the claimant paid for that notice period?

66. No. The claimant was paid for the period up to 30 November 2022.

What was agreed between the parties in terms of notice pay on 25 November 2022 and in what circumstances? Was there a waiver of the notice period?

67. As per my findings of fact, it is my decision that there was a waiver of the 3-month notice period, in that the claimant and the respondent reached a mutual agreement to vary the claimant's notice period such that he would resign from his employment and receive notice pay only up to the end of November 2022.
68. In return, the respondent agreed that it would not pursue the claimant for any alleged breach of contract on his part.
69. This was a valid agreement, which I decide was not reached under duress.

If not, how much should the claimant be awarded as damages?

70. Given my decision, the claimant should not be awarded any amount as damages, since there has been no breach of contract on the part of the respondent.

Employer's contract claim

Was the claim outstanding when the claimant's employment ended?

71. As a result of this finding, issues (g) – (k) need not be addressed.

10 October 2023

JUDGMENT SENT TO THE PARTIES ON
19 October 2023

FOR THE TRIBUNAL OFFICE

Notes

1. 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.