

REASONS

1. Claims

- 1.1. Unfair dismissal – constructive.

2. Issues

The issues in this case relate to:

- 2.1. Did the claimant terminate his contract in circumstances when he was entitled to do so without notice by reason of the respondent's conduct?
- 2.2. Did the respondent's conduct amount to a repudiatory breach?
- 2.3. Was the respondent's conduct a significant breach going to the root of the contract?
- 2.4. Did the respondent's conduct show that the respondent no longer intended to be bound by one or more essential terms of the contract.

3. The law

The Tribunal has to have regard to the following provisions of the law:

- 3.1. Section 95(1)(c) Employment Rights Act (ERA):

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

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.” Subsection (2) does not apply in this case.

3.2 Dictum of Lord Denning MR in *Western Excavating (ECC) Limited v Sharp* [1978] ICR 221 CA (Western), the relevant parts of which are set out at paragraphs 2.2 to 2.4 above.

3.3 *Woods v W.M. Car Services Limited* [1981] IRLR 347 (Woods) which I was referred by counsel for the claimant in his written submission, where it was held that upon consideration of whether the respondent was in repudiatory breach it was necessary to look at the respondent's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the claimant could not be expected to put up with it.

4. Facts

The Tribunal, having carefully reviewed all the evidence (both oral and documentary) before it, finds the following facts (proved on the balance of probabilities):

- 4.1. The claimant was employed by the respondent as a dental lab manager from a date which the parties agree as 10 February 2014 until the claimant's resignation taking effect on 19 February 2023.
- 4.2. The claimant's most recent contract is dated 27 January 2022. By Clause 3.1 the contract stated that the claimant's duties were set out in an attached job

description. No job description was attached and the respondent was unable to produce a copy for the purpose of these proceedings. The claimant gave evidence as to his job – making sure that technicians had everything that they needed, ordering stock, checking stock, some accounting and invoicing, contacting suppliers, regulating compliance and performing other tasks requested by management. The claimant also did small amounts of work at Beechwood Dental, part of the same group as the respondent, and at a charitable foundation. The Tribunal finds the above to be the claimant's job description as a matter of fact as it does regarding the claimant's evidence that he was responsible for setting up the lab from scratch including procuring BUPA and DAMAS approval. DAMAS is a dental appliance manufacturing scheme. The claimant managed the lab finances with Lee Bardsley, the dental lab technician, who gave evidence to the Tribunal. Dr Rangzeb, the clinical lead and a director of the respondent and who also gave evidence, did not agree that the claimant handled stock or invoices. The Tribunal prefers the evidence of the claimant.

- 4.3. By Clause 7.1 of the contract the claimant's normal days of work were Monday to Friday. The claimant was required to work additional hours as may be necessary for the proper performance of his duties without extra remuneration. The claimant gave evidence that he worked in the practice from Monday to Thursday and worked from home on Fridays. This was with the agreement of his mother, Mrs Rachel Dilley, who gave evidence to the Tribunal and who had been the practice manager when the agreement was made. The claimant also said that he completed tasks during weekends. He said that he worked 10 hours a day with one hour lunch break.
- 4.4. The claimant's contract also provided at Clause 8.1 that if there was a reduction in work the respondent could reduce the claimant's working hours and pay proportionately with as much notice as was reasonably practicable.
- 4.5. Mrs Dilley resigned from the respondent with effect from 31 December 2022. Dr Rangzeb, and it seems to be common ground, says that the relationship between Mrs Dilley and Dr Rangzeb broke down. The Tribunal finds that this was a key moment in the claimant's relationship with the respondent. It should be noted that at the end of November 2022 Dr Rangzeb had dismissed the claimant's wife after she had worked two days as a receptionist. After his mother left the claimant perceived a change in attitude towards the claimant from Dr Rangzeb. The claimant felt that Dr Rangzeb was ignoring the claimant and undermined him in front of colleagues. The claimant requested a meeting with Dr Rangzeb to discuss changes but was ignored by Dr Rangzeb and on 9 January 2023 a meeting was held amongst staff to which the claimant was not invited.
- 4.6. On or about 10 January 2023 Dr Rangzeb approached the claimant, in front of a dental apprentice, and discussed with the claimant whether he the claimant was honouring his hours.
- 4.7. On the same day Lee Bardsley, the dental lab technician, approached the claimant and stated that he had been instructed by Dr Rangzeb that Mr Bardsley was now to perform tasks primarily the responsibility of the

claimant. For example, Mr Bardsley asked for invoices which were the claimant's responsibility.

- 4.8. A meeting between the claimant and Dr Rangzeb was fixed for 12 January 2023, but it was cancelled not by Dr Rangzeb personally but by another member of staff at 30 minutes' notice, because it was said Dr Rangzeb did not have time for the meeting. No re-arranged meeting ever took place, despite requests and despite the fact that the claimant had previously had weekly meetings with Mrs Dilley.
- 4.9. On 25 January 2023 Dr Rangzeb handed the claimant a letter (bundle page 92) purporting to reduce the claimant's hours from 43 hours a week to 18 hours per week "after conducting a business review", now working only Mondays and Thursdays from 8am to 6pm. Previously as we have said the claimant was required to work Mondays to Fridays but in cross-examination Dr Rangzeb accepted that the claimant worked on Fridays and sometimes on Saturdays and Sundays. The letter of 25 January 2023 referred to reduction of hours from 43 hours per week to 18 hours per week and not as we shall see from 43 hours to 36 hours per week. The Tribunal finds that there was no proper consultation between the respondent and the claimant. In cross-examination Dr Rangzeb stated that in hindsight maybe he should have sat down with the claimant. But Dr Rangzeb said he did not. He said that he could not remember if he spoke to the claimant but he knew no conversation had taken place. Dr Rangzeb said that the respondent was in debt. However no substantive evidence was placed before the Tribunal to substantiate the debt, although Dr Rangzeb came up with an unsubstantiated figure of £250,000. There was an earlier letter dated 17 January 2023 matching the letter of 25 January 2023 (see bundle page 41) although the Tribunal finds that the letter which the claimant actually received was the one dated 25 January 2023.
- 4.10. It appears that there was yet another letter, this time dated 9 January 2023, which was produced to the Tribunal twice in the bundle (pages 40 and 91) which purported to say that the claimant had already had his hours reduced from 43 hours per week to 36 hours per week. The claimant says he never received this letter and the Tribunal find this to be so. The letter referred to sign-in sheets, the purpose of which appeared to justify the reduction in hours, but no such sheets were ever produced to the Tribunal, in common with the missing job description. Dr Rangzeb alleges that he stated that the change in hours happened because the claimant was paid for Fridays and the claimant said that he worked from home but Dr Rangzeb, having taken soundings from the staff, formed the view that the claimant did not work on Fridays at all. As can be seen above a Friday home arrangement was made with Mrs Dilley.
- 4.11. The respondent sought it said to exercise its contractual right to reduce the claimant's hours by reason of Clause 8.1 of the claimant's contract, which the respondent maintained gave the right if there was a reduction in work to reduce working hours. This clause is under the heading of "Lay Off and Short Time Working" and certainly does not relate to whether or not an employer is in debt, nor if there is allegation that an employee is not working

on a particular day. In any event the Tribunal finds that there was no evidence of a reduction in work and/or if there was it was not explained to the claimant. Dr Rangzeb conceded in cross-examination that the claimant had not been made redundant. Dr Rangzeb told us that he was not expecting the claimant to resign, as he thought the claimant would get another part time job. Mr Bardsley said he was already doing the claimant's job and that the claimant did not know how to run a lab and Mr Bardsley

stated it was not really any wonder that the claimant had gone. Mr Bardsley admitted that he had never reported any suspected question relating to the claimant's capability to Dr Rangzeb, nor had he reported any alleged shortcomings to Dr Rangzeb. Dr Rangzeb did not give any reasons relating to redundancy as we know nor any allegation regarding the claimant's capability. The Tribunal whilst not preferring the evidence of either Dr Rangzeb or Mr Bardsley found Mr Bardsley in particular unnecessarily hostile towards the claimant in his evidence.

4.12. At all events the claimant refused to accept what we find is the only reduction in hours communicated to him, namely, 43 hours per week to 18 hours per week and on 5 February 2023 the claimant resigned with effect from 19 February 2023, stating that he had come to the conclusion that he could no longer keep his employment working for Dr Rangzeb and Dr Rangzeb's businesses. The claimant asked for a copy of his contract of employment and the grievance procedures in his resignation letter but has never received them to this day other than in the case of the contract of employment through the disclosure procedure.

5. Determination of the Issues

(After listening to the factual and legal submissions made by and on behalf of the respective parties):

5.1. What if any was the conduct entitling the claimant to terminate his contract? (section 91(1)(c) (ERA).

5.1.1. There was certainly a change in Dr Rangzeb's attitude to the claimant following Mrs Dilley's resignation:

5.1.1.1. Dr Rangzeb's attitude to the claimant in front of colleagues;

5.1.1.2. Dr Rangzeb's refusal to meet the claimant;

5.1.1.3. The holding of a meeting of colleagues without inviting the claimant;

5.1.1.4. The failure to communicate with the claimant in relation to the first reduction of hours, if it did indeed take place;

5.1.1.5. The attempt to reduce the claimant's hours from 43 hours to 36 hours;

5.1.1.6. Discussing the claimant's hours in front of an apprentice;

5.1.1.7. Instructing Mr Bardsley to tell the claimant that Mr Bardsley was to perform some of the claimant's tasks;

5.1.1.8. Failure to meet with the claimant and then cancelling a meeting at short notice never to be reconvened; and

5.1.1.9. Reducing the claimant's hours from 43 hours to 18 hours without consultation.

5.1.2. The question here is how, if at all, does Clause 8.1 of the claimant's contract assist the respondent? If Clause 8.1 applies then in relation to that aspect there is no conduct relating to what the claimant gives as the reason for his resignation. That Clause (8.1) specifically relates to a reduction of hours and in my view if there is a reduction of work relating to lay off or short time. The respondent never called evidence that there was a reduction in work. The reason given was that the respondent was in debt. That does not amount to a reduction in work within the meaning of Clause 8.1 so Clause 8.1 does not engage. The claimant is, therefore, entitled to rely on his reduced hours as conduct by the respondent and this is the reason he gives for his dismissal, not the other reasons given above, but they do go to colouring the main reason in accordance with Woods. The main reason was a step taken by the respondent without the claimant's consent and in breach of contract.

5.2. Given this conduct was it a repudiatory breach? (Western). Was it a breach of contract? Was it repudiatory? What the respondent purported to do was to cut the claimant's hours by more than half without consultation and by unlawful use of a term in the contract of employment (Clause 8.1).

5.3. So was it a significant breach going to the root of the contract? If the answer to 5.2 is yes, which it must be, then the answer to paragraph 5.3 must be yes.

5.4. Did the respondent's conduct show that the respondent no longer intended to be bound by one or more essential terms of the contract. It was clear, following Mrs Dilley's resignation, and certainly relating to the term of the contract relating to the claimant's right to his hours (Clause 8.1) and in relation thereto the manner in which the claimant was treated by the respondent, that the respondent no longer intended to be bound by the contract.

5.5. In coming to the Tribunal's conclusion the Tribunal has looked at the respondent's conduct from January 2023 as a whole and coming to the conclusion that the claimant could not reasonably be expected to put up with it (Woods). This adds further support to the claimant's position.

5.6. In all the circumstances the Tribunal finds that the claimant was dismissed and was entitled to terminate his contract by reason of the respondent's conduct.

5.7. The respondent was asked at the hearing whether it wished to put forward a reason for dismissal should the Tribunal find that the claimant was dismissed and the respondent declined to do so.

5.8. The Tribunal, therefore, finds that the claimant was unfairly dismissed by the respondent and the hearing will be adjourned until [see Judgment] to consider remedy.

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Employment Judge Shulman

Date 23 November 2023

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