EMPLOYMENT TRIBUNALS

Heard at: London South **On:** 13 December 2023

Claimant: Mr J Hodge

Respondent: Glassbox Trading Limited, T/A Aquatechniques

Before: Employment Judge Ramsden

Representation:

Claimant In person

Respondent Mr Flood, co-owner

RESERVED JUDGMENT

1. The Claimant's claims of:

   a) Unfair dismissal;

   b) Breach of contract relating to the failure to pay him notice pay; and

   c) Unlawful deduction from wages relating to the failure to pay him in lieu of accrued but untaken holiday pay,

   are not-well founded and are dismissed.

REASONS

Background

2. The Respondent operates an ornamental fish business, namely aquarium design, installation and maintenance services in the South East of England. The business is owned and operated by Mr and Mrs Flood, who are also the two statutory directors of the Respondent.

3. The Claimant worked for the Respondent in a Fish Tank Maintenance role from late September 2019 until 22 January 2023. The parties disagree about whether he was dismissed or his employment ended by mutual agreement. He has made the following complaints against the Respondent:

a) That he was unfairly dismissed, either by reason of capability or redundancy;

b) That he was wrongfully dismissed when the Respondent terminated his employment without notice or pay in lieu of notice; and

c) That he was not paid in lieu of his accrued but untaken holiday entitlement of 2.5 days.

4. Early conciliation between the parties began on 24 February and ended on 7 April 2023. The Claimant filed his Claim Form on 5 May 2023. The Respondent filed its Response on 18 July 2023.

Facts

5. The Claimant started working for the Respondent on either 25 or 26 September 2019.

6. His work involved cleaning and maintaining fish tanks. He often travelled to client's homes as part of that role, and drove one of the Respondent's vans when doing so.

7. The Claimant habitually bit his nails very low during his employment.

8. In mid-May of 2022, the Claimant went to see his doctor about an infected finger. He was ultimately seen by an infectious diseases specialist at St George's Hospital, who on 29 June 2022 diagnosed the Claimant with a bacterial infection (which had now spread to other parts of his arm) known as Mycobacterium Marinum. In fish this causes a tuberculosis-type illness. In humans infection can occur when injured skin is exposed to water contaminated with the bacteria, and it presents as a skin infection. An infection of this kind is apparently incredibly rare in humans.

9. The parties agree that the Claimant had not been provided with personal protective equipment (**PPE**) prior to this occurrence, and nor is it common in this industry for gloves to be used for this kind of work. The Claimant's parents wrote to the Respondent the day after the Claimant's diagnosis to make them aware of that fact, and to request that he was provided with suitable gloves to protect him while he was fighting the infection. The Respondent purchased two pairs of gloves with sleeves going all the way up the arms. The Respondent says that the Claimant was observed at times after this point working without those gloves, using only ordinary disposable gloves. The Claimant says that that is because some of his colleagues sometimes took the gloves and used them, and then he used disposable gloves as the best available alternative. He agreed that he had not raised the difficulty of being able to use the specially-purchased gloves with the Floods. In the course of the Claimant's evidence Mr Flood asked him why he did not use his company credit (which the Claimant used to purchase

replacement parts, necessary cleaning products, etc., so as to perform his role) to buy more gloves. The Claimant replied that he did not consider that an option, as he had begin to feel unwelcome at the company.

10. The treatment prescribed for the Claimant's infection was high dose antibiotics for a period ranging from three to 12 months. The effects of the infection and medication included unpleasant nausea, resulting in the Claimant being too unwell to work in the mornings and often in the afternoons. The Claimant requested, and was granted, permission to reduce his working hours to afternoons only. Furthermore, illness and medical appointments meant that the Claimant often did not work afternoons either. The Claimant estimates that he worked two or three afternoon shifts a week. He experienced a drop in earnings, as he was only paid for the time he worked.

11. The Claimant's reduced working hours had an impact upon the Respondent's business, with customers complaining of poor customer service and about wait times for fish tank maintenance. As a result, the Respondent engaged an additional person to maintain fish tanks (i.e., the same role as the Claimant).

12. In anticipation of the Claimant's return to work, the Respondent sought to make contact with its employer's liability insurance provider, in light of the fact that the Claimant had been absent due to a work-related illness. The Respondent says that its solicitor, who had liaised with its insurer, advised that if the Claimant came back to work and suffered a return of his condition, it would be easy for him to say that the Respondent had prior knowledge of his condition, and for a health and safety breach claim to be brought. In consequence of this advice, the Respondent sought to reassign the Claimant to work in its pond construction and refurbishment team, as there was no, or very low, exposure to water with fish in it as part of that role.

13. In October 2022, the Claimant met with Mr and Mrs Flood, and Mr and Mrs Flood raised the prospect of the Claimant's reassignment to the pond construction and refurbishment role. The Claimant was not enthusiastic about a change of role, and he continued to do other bits of work which did not involve putting his hands into water that had fish in it while he recovered from his infection. The Claimant says that, in this October meeting, Mr and Mrs Flood each said words to the effect of "*I don't know why you are working here at a place that makes you sick. If I was you, I would quit.*" The Respondent denies that this was said, arguing that instead the Claimant was asked by them if he still felt comfortable working with fish tanks given the infection, which the Claimant said he did.

14. The Claimant was recovered by January 2023, but Mr and Mrs Flood were not willing for him to return to the Fish Tank Maintenance role. They were concerned that the Claimant's propensity to be reinfected with the same infection was increased because he had already succumbed to it. The Claimant told them that he had been advised by his doctor that his risk of infection was no higher than

anyone else's, but they remained unwilling for him to his post. They told the Claimant this in the January, and reassigned him to the pond construction role.

15. The Claimant was unwell – for an unrelated reason – on the first two days in January. The Respondent contends that the Claimant asked for his sickness absence on those two days to be taken as holiday so that his earnings were not reduced. When asked about this in oral evidence, the Claimant agreed that he had been absent for the first two working days of 2023, but said that he could not recall if he had asked for that to be treated as holiday leave. The Claimant then returned to work in the Pond Construction role.

16. After a couple of weeks in the Pond Construction role, the Claimant asked to meet with Mr and Mrs Flood, which meeting took place on 20 January 2023. The Claimant:

    a) said he was not happy in the Pond Construction role, particularly as he had learned that he was being paid less than others doing the same role. Mr and Mrs Flood confirmed that they were not willing to increase his pay at that time; and

    b) reiterated that he had been advised by his doctor that he had no greater propensity to contract a Mycobacterium Marinum infection than any other person.

17. Mr and Mrs Flood remained resolute that he was not to return to his Fish Tank Maintenance role.

18. The parties disagree as to what happened next.

    a) The Respondent says that, at this point, the Claimant raised the prospect of his being made redundant, with words to the effect that "*In that case, I would need to be made redundant*". Both Mr and Mrs Flood's evidence is that they have some knowledge of what redundancy is, and they were clear that his role was not redundant, but said that they were willing to end his employment by mutual agreement and pay the Claimant a sum of money equivalent to the redundancy pay he would be entitled to plus a sum equivalent to an extra week's pay (i.e., four weeks' money). The Respondent says that the Claimant said he wanted some time to consider it.

    b) By contrast, the Claimant says that when Mr and Mrs Flood were adamant that he could not return to his Fish Tank Maintenance role, he did not know what that meant, so he asked the question "*Does this mean redundancy then?*", because he did not know where he stood.

19. The parties agree that the Respondent sent the Claimant a letter later that same day, which included the following:

    "*Further to our conversation this morning and, carrying on from your issues and our conversations last year, now that you have returned to work, we have looked*

at where we can change your role within our business to ensure we do not expose you to further risk with regard to the bacterial infection you picked up from an aquarium. As we explained during our meeting, we have a duty of care to our employees to make sure they are safe at work, and we feel that the risk of re-infection is too high in the aquarium maintenance role… so have looked at the other roles in the business.

You have obviously been working within the pond construction teams for the last few weeks as and when you have been at work, but you have confirmed that this is not something that you want to do moving forward. Unfortunately, I have no other viable current positions within the business to offer which could meet the reduction in risk from the aquarium bacteria.

You mentioned redundancy, and this seems the only viable option available to us if the current pond construction role is not acceptable…

I am sorry this has been such a difficult situation all round, and the above pond construction position was genuinely offered to provide alternative employment within the business whilst maintaining our responsibility to ensure your health and safety at work, and it is sad that this was not viable for you…".

20. Two days later, on 22 January 2022, the Claimant sent a text message to Mrs Flood, in the following terms:

"*Hi Emma, I will be taking the redundancy offer.*

Il gather up all of the company things at my house and drop them off at some point, ie the clothes and that.

Thanks."

21. The Respondent says that it paid the Claimant the sum equivalent to four weeks' money as agreed. It says that no notice pay was due to him, given his employment terminated by mutual agreement, and he had only accrued 1.15 days' holiday at the termination date but had taken two days' holiday at the start of the month, so there was no outstanding holiday entitlement to pay him for. The Claimant agrees that a sum of money was received by him on 3 March 2023, but he has not been given a payslip or P45 to understand the composition and calculation of that sum. The Respondent says that the amount paid equates to the agreed payment of four weeks' pay.

22. The Claimant provided various documents to the Tribunal, being:

    a) the 20 January letter from the Respondent;

    b) a timeline/description of events he prepared;

    c) a copy of the email from his parents to Mr and Mrs Flood requesting gloves;

    d) some post-operation advice he was given by St George's Hospital;

e) a letter from his consultant dated 24 January 2023 (so two days after his dismissal), explaining the infection the Claimant had and observing:

"*I do not think there is any reason to suggest Joshua is at a high risk of getting this infection again. As long as his hands are not exposed to contaminated water when he has abrasions or cuts, there should be no reason to think he is at any greater risk of this infection than anyone else*"; and

f) his schedule of loss.

23. The Respondent disclosed the text correspondence between Mrs Flood and the Claimant described above.

The hearing

24. The Respondent was represented in the hearing by Mr Flood. The Claimant presented his own case.

25. Neither party had prepared a bundle, nor witness statements, and this was not required by the standard orders sent to them.

26. Mr and Mrs Flood gave evidence in support of the Respondent's position, and the Claimant in support of his own.

Law

Was the employee dismissed?

27. The employment relationship is based on a contract between the employer and employee. Like any contract, it is capable of being terminated by either party, or by both parties agreeing to bring it to an end.

28. If the employer terminates the contract, that is a dismissal of the employee, but if employment terminates either by the employee resigning or by mutual agreement, there is no dismissal, and therefore no question of unfair dismissal arises (save, in the case of a resignation, where that is a constructive unfair dismissal – which is not a question in issue here).

29. Because an employment relationship commonly involves an imbalance in power between the typically-more-economically-powerful employer and the typically-more-economically-dependent employee, clear evidence is needed to demonstrate that an employment contract has been terminated by mutual agreement.

30. Termination by agreement can be first suggested by the employer and still be genuine, although the tribunals and courts may well apply more careful scrutiny

to the facts to determine whether in fact this was a termination by agreement (*Hart v British Veterinary Association* EAT 145/78).

31. Whether an employee agrees to bring a contract to an end is a question of fact (*Martin v Glynwed Distribution Ltd* [1983] ICR 511), and the particular situation they find themselves in will be relevant to whether they can truly be said to have 'agreed' to terminate their employment. For example, when faced with different unattractive alternatives, an employee may consider the termination of their employment to be the least bad option, and that may rightly be regarded as a dismissal if the employer applied such pressure that the employee reasonably believed they had no effective option but to resign.

32. As Lord Justice Ackner put it in the Court of Appeal case of *Birch and Humber v University of Liverpool* [1985] IRLR 165, the issue is essentially one of fact and degree:

"*Was there any pressure placed upon the employee to resign?; and if so, was the degree of pressure such as to amount in reality to a dismissal?*"

Unlawful deductions for accrued but untaken holiday pay

33. All employees are entitled to a certain amount of holiday entitlement – the statutory minimum or, if more, the amount set out in their contract of employment. The Claimant is claiming that he not paid a sufficient sum for his accrued but untaken holiday, i.e., that in breach of section 13 of the Employment Rights Act 1996, the Respondent has made a deduction from his wages in respect of the holiday he accrued up to the termination of his employment.

34. Regulation 14 of the Working Time Regulations 1998 provides that if a worker's employment is terminated during the course of the leave year, the worker is entitled to be paid in lieu of the holiday accrued in the proportion of the leave year worked.

Application to the claims here

The first issue: was the Claimant dismissed, or was his employment terminated by mutual agreement?

35. The fairness of the Claimant's treatment, for example, in relation to the forcible change of his role, is only in issue if he was in fact dismissed as he avers. The Claimant had not asserted, and nor does the Respondent, that he resigned from his employment in response to his treatment at the Respondent's hands. Rather, his position is that the Respondent dismissed him – presenting him with two bad options (being moved to Pond Construction, or leaving in return for four weeks' pay), and he chose 'the lesser of two evils'.

36. The Respondent, by contrast, says that it was the Claimant who presented the option of his leaving by mutual agreement. Mr and Mrs Flood are adamant that they were content to continue to employ him in the Pond Construction role (on the same pay and benefits package as his Fish Tank Maintenance role), and that it was the Claimant who raised the subject of his leaving in return for a package.

37. There is little evidence to go on at when grappling with this question of whose suggestion it was. The letter from the Respondent of 20 January refers to *the Claimant* having mentioned redundancy. The text exchange does not shed any light on who raised the subject of "redundancy". (It refers to "*the redundancy offer*", which may imply that it was suggested by the Respondent, but equally it could be referring to what was offered in response to the Claimant's suggestion.) The oral evidence from the parties naturally supports their respective positions.

38. A further piece of documentary evidence that does seem to help is the post-termination letter from the Claimant's doctor. That letter, which apparently supports the Claimant's position that his risk of re-infection is no higher than anyone else's (although perhaps only if the Claimant has stopped biting his nails to such an extent that his fingers are regularly bleeding) had not been seen by Mr or Mrs Flood prior to the tribunal hearing. The Claimant's position – that he wanted to continue in the Fish Tank Maintenance role but was "*being forced out of a position [he] was fit and able to do*" by Mr and Mrs Flood because they were concerned about the risk of re-infection – does not fit with the fact that he failed to show that letter to the Respondent when it arrived a few days after the termination of his employment. He had been telling the Floods that his risk was not higher than his colleagues', and this letter supported that position. If the Claimant's position is to be believed, he surely would have presented that letter to the Floods when it arrived in an attempt to undo the termination of his employment and resume his Fish Tank Maintenance role. When the Claimant was asked about this by the Employment Judge he said that he did not feel it was going to change anything, as Mr and Mrs Flood simply wanted him out of the company, and that while he recognised that a letter from his doctor would likely carry more weight than the Claimant's word about the fact that he was at no greater risk of infection, he felt like they were not interested in the evidence.

39. Again, this just does not fit with a narrative where, as both parties agree, it was the Claimant who brought the situation to a head by calling for a meeting with the Floods about his unhappiness in the Pond Construction role. He knew he had asked his doctor for a letter to the effect of the 24 January one. If he really wanted to return to the Fish Tank Maintenance role then it is much more plausible that he would have 'hung on' in the Pond Construction role until that letter arrived and then shown it to the Respondent. Had the Respondent ignored that letter at that point then it would have supported the Claimant's position that the Respondent was not interested in evidence and just wanted him out.

40. Consequently, in the face of conflicting oral accounts from Mr and Mrs Flood on the one hand the Claimant on the other, there are two documents which support the Respondent's position that the termination of the Claimant's employment was by mutual agreement at his instigation – the 20 January letter from the Respondent to the Claimant, together with the fact that the 24 January letter from the Claimant's consultant was never shown to the Respondent.

41. As the case law shows, an apparent 'mutual' agreement to terminate employment may still rightly be regarded as a dismissal by the employer if the 'agreement' resulted from pressure applied by the employer such that the employee reasonably believed they had no effective option but to resign (*Martin*).

42. Again, on this factual issue there is a conflict of evidence in this case. The Claimant describes feeling pushed out, unwelcome and not wanted, whereas Mr and Mrs Flood for the Respondent maintain that the offer of the role in the Pond Construction team was a genuine one. The limited documentary evidence is the 20 January letter authored by Mr Flood, which supports the Respondent's position: "*the above pond construction position was genuinely offered to provide alternative employment within the business whilst maintaining our responsibility to ensure your health and safety at work, and it is sad that this was not viable for you.*"

43. The Claimant described feeling like he was stuck between a rock and a hard place: the Floods were unwilling for him to return to the Fish Tank Maintenance role, and he did not want to continue in the Pond Construction team without a pay rise.

44. In the Tribunal's view, this is not akin to the situation in the *Martin* case where the employee resigned rather than be dismissed. This was, from the Claimant's perspective, a choice between two evils, and he chose the lesser, but he was not *forced* to end his employment – that was still at his discretion, even though he did not like the terms on which his employment could otherwise continue. That is entirely different from a scenario where the employee's employment ends one way or the other, where an apparent 'agreement' to bring that employment to an end is in reality choosing between alternatives terms on which it ends.

45. The Tribunal finds that the Claimant's employment was terminated by mutual agreement, and should rightly be seen as such. Therefore his claims for unfair and wrongful dismissal fail.

The second issue: outstanding holiday pay

46. As for his claim for outstanding holiday pay, it is perfectly understandable that the Claimant cannot understand the components of pay that were paid to him on 3 March – the Respondent should have sent him a pay slip and an explanation as to what was paid and how it was calculated.

47. However the Claimant's position - that he agrees that he was sick for the first two working days of January but cannot recall whether he asked to take them as holiday - is not plausible. In a situation where he has been, according to his own evidence, economically stretched for months by reduced pay as a result of a work-related illness, he would, in the Tribunal's judgment, remember whether he asked to take that leave as holiday or not. He has not proven on the balance of probabilities that he was owed holiday pay on the termination of his employment, and so that claim also fails.

Conclusions

48. For the above reasons, the Claimant's claims are not made out and are dismissed.

Employment Judge Ramsden

Date 20 December 2023