EMPLOYMENT TRIBUNALS

Claimant: Mr S Giles
Respondents: 1. Own Property Ltd
2. Own Projects Ltd

Heard at: London Central (by CVP)

On: 23 and 24/7/2024
Before: Employment Judge Mr J S Burns

Representation
Claimant: In person
Respondent: Mrs S Younis (Solicitor)

JUDGMENT

1. The Unfair dismissal claim is dismissed on withdrawal by the Claimant
2. Own Projects Ltd is added as Second Respondent.
3. It is declared that both Respondents were the employers of the Claimant at the time of his dismissal
4. The Claimant was wrongfully dismissed by the Respondents
5. The Respondents were in breach of their duty/ies in section 1 ERA 1996 when the proceedings commenced such that section 38 Employment Act 2002 applies
6. A preparation time order against the Respondents is made in favour of the Claimant
7. In relation to all matters, the Respondents must pay the Claimant £7093.72 by 7/8/24, their liability being joint and several, the one paying the other to be absolved.
8. The claim issued by the Claimant under case number 2217460/24 is not to be accepted or processed further.

Reasons

1. The claim is for wrongful dismissal only. The Claimant withdrew his unfair dismissal claim. I explained to him that damages for injury to feelings caused by wrongful dismissal are not available in the ET.

2. I was referred to a bundle of Respondents' documents of 344 pages and to miscellaneous documents from the Claimant. I heard evidence from the Respondents witnesses A Labridis, D Polychroniadis and I Carr, and then from the Claimant, and his witness N Frisoli. I read the statement of M Xenos who was in Greece and unable to give oral evidence from that country. I received oral and written final submissions from Ms Younis on behalf of both Respondents and oral final submissions from the Claimant.

Joinder of R2

3. It became apparent early on during the Hearing that Own Projects Ltd should be added to these proceedings as a Second Respondent under Rule 34. Mrs Younis on behalf of Own

Projects Ltd initially suggested that this would require an adjournment of the trial. However following a discussion about this she decided not to pursue an application for an adjournment, agreeing that the trial could proceed against both Respondents. This accorded with my view of the case as the real issue between the parties was whether or not the Claimant had been guilty of gross misconduct which certainly did not require an adjournment in order to be dealt with fairly. The identity of the true employer was a matter already canvassed in the ET3, and its fair determination was possible based on my construing the available evidence about this (including the oral evidence of the Claimant and Mr Labridis which both were able to give fully) which would have been very unlikely to have been changed following any adjournment. In all the circumstances including the modest quantum of any viable claim, the number of witnesses who had made themselves available for the listed hearing, and the lack of any good purpose which would be served, it would have been disproportionate to adjourn the trial and vacate the 2-day listing.

Findings of fact

4. The Claimant was employed from July 2022. He was issued a statement of Terms and Conditions (84) which stated that the Claimant was employed by Own Projects Ltd.

5. The Terms and Conditions also provided that (after successfully completing probation and before working for the employer for 5 years) he would be entitled to receive three months notice of termination from his employer. The PILON clause ran : "*We reserve the contractual right to give pay in lieu of all or any part of the above notice by either party."*

6. The Claimant was paid by Own Property Ltd (the First Respondent) and received payslips issued by that company. The Respondents are closely associated having the same directors and registered address and run together under the title "OWN London".

7. The Claimant's salary was £45000 per year. In addition the Terms and Conditions stated that he was entitled to a £3000 performance bonus but that this "*did not form part of your contract of employment and can be withdrawn or amended at any time*". In September 2023 the Claimant received a bonus of £4000.

8. On 4 July 2022 (ie at the very beginning of his employment), the Claimant set up and subsequently maintained an email account, namely propertyownlondon@gmail.com

9. Manthos Xenos who had been a director, and the Claimants direct line manager at the time, gave him authorisation for this account at the time he set it up. There is no contemporary document to show this but I accept the Claimant's evidence that the authority was given orally, which evidence is corroborated by Mr Xenos's witness statement.

10. The account was created as the company email addresses could not synchronise with Google maps across the multiple devices which were allocated to the Claimant in order for him to fulfil his role as Head of Property Management. By logging in through the gmail account the Claimant was able to store numerous work destination addresses on the Google maps app. I do not accept the Respondents' submission that the existence of some other apps (eg Sky) on the record of that account shows that its main purpose was not as the Claimant described, in which he has been consistent throughout.

11. Mrs Younis stated early on in the Hearing that it was not suggested by the Respondents that the account was used by the Claimant to steal information, or used for any inappropriate purpose against his employer. In his oral evidence Mr Labridis said he suspected that the Claimant had put or intended to put the email account to some inappropriate use. However no evidence to support this suspicion has been produced.

12. Ms Frisoli who was the Respondents' book-keeper and administrator until very recently, appeared me to be a sensible and honest witness. She told me that she had seen no evidence at all of any wrongdoing by the Claimant and that he had appeared to her to be a loyal and hardworking employee throughout. She also stated that all necessary passwords and access information including the email address propertyownlomndon@gmail.com were provided to her by the Claimant in September 2023 when she joined the company and was stored by her on OWN London's shared folders in December 2023. I reject the Respondents' submission that her evidence was inconsistent about this.

13. The employment relationship between Mr Xenos and Mr Labridis deteriorated and this lead to a cooling in the relationship between Mr Labridis and the Claimant also. On 29/11/23 there was a meeting between them of which the Claimant attempted to make a recording using his company mobile phone. Mr Labridis confiscated the phone and shortly afterwards sent an email to an HR company including the following :"*I need to terminate his employment as he is causing problems….Please advise how we can move forward as I cannot do business with him and I have to terminate his employment*."

14. The Claimant changed the passwords on his gmail account so he could access it through his own device. He promptly provided Mrs Frisoli on behalf of the Respondents with the new passwords, but they did not work. It is unclear what the exact reasons for this were.

15. The Claimant gave notice of resignation on 3/12/23 effective 29/2/24, with the intention thereafter of taking up other employment within his own company. Shortly afterwards he was asked to sign a restraint of trade agreement which he refused to do.

16. On 13/12/23 he was summoned to a disciplinary hearing at a later date.

17. On 17/1/24 the Claimant asked Mr Labridis by email "*Please advise on who my employer is, Own Projects or Own Property?*". Mr Labridis answered "*Your employer is Own Property Ltd".* (223)

18. On 25/1/24 the Claimant was summarily dismissed. At that point his setting-up of the email account and two other matters were relied on as reasons for the dismissal. Those two other matters were subsequently overturned in an internal appeal. At the appeal hearing in February 24 the charges in relation to the gmail account were changed from setting up the account in the first place to not facilitating access by the Respondent to the account after the mobile phone had been confiscated. It was then said that the two step verification details which the Claimant had used to change the passwords in November were preventing this. The email reason was not overturned at the appeal and is the sole matter which the Respondents now rely on as the claimed "gross misconduct" in order to try to justify the summary dismissal. Ms Younis made this clear for the first time only after the Hearing had started on 23/4/24.

19. Immediately after the dismissal a formal report was drawn up by Peninsula on the Respondents' behalf in relation to the dismissal. It stated on the front page that the Claimant's employer (and hence the company which had dismissed him) was OWN Projects Ltd.

20. The Claimant was issued a P45 which stated that his employer had been OWN Property Ltd.

21. Starting in February 24 onwards the Claimant has repeatedly offered the Respondent access to the gmail account on a supervised basis. He made a formal offer of this again in June 24 but was not taken up on this. He made another offer during the Hearing to access the gmail account and display its contents on screen which the Respondents did not agree to.

22. I was taken to the Respondents' employee handbook. This has an extended section under the title *"(emails) Procedures - authorized use"* (54). The Claimant did not accept that this particular section was part of the handbook when he was employed and he claimed that it has been inserted subsequently by the Respondents for purposes of the ET proceedings. I do not have to decide whether or not that is the case because in any event here is nothing in that section or elsewhere in the handbook which states that an employee cannot set up a private email for work purposes. In any event another section (72) classifies "*unauthorized use of email or internet*" as "*unsatisfactory conduct and misconduct*" but not as gross misconduct, which is dealt with in a separate section (73) .

23. On 21/3/24 the Claimant issued this instant ET1 claim (2216968/24) against the First Respondent, which was accepted by the tribunal. On the same date he filed a second ET1 against Own Projects Ltd which was assigned case number 2217460/24. This was referred to a legal officer which sent the Claimant a letter dated 17/4/24 asking him whether or not he wished to continue with it. To date (24/7/24) it had not been accepted as far as I know.

24. The First Respondent filed an ET3 in the instant case 2216968/24 on about 16/5/24 stating that the Claimant had been employed by Own Projects Ltd (and not by it) and requesting that the name of the Respondent should be amended accordingly.

25. In its witness statements for the Final Hearing the Respondent's directors made statements

such as "*Mr Giles was employed by the Respondent (a reference to Own Property Ltd)…"*[1] In his oral evidence Mr Labridi gave detailed evidence stating that the Terms and Conditions were incorrect and at all times the First Respondent (Own Property Ltd) was the Claimant's employer and that the cost of employing the Claimant had been treated as an expense of the First Respondent for tax purposes.

26. Mrs Younis's final submissions on the point were that the correct employer was the First Respondent (ie the opposite of what was pleaded in the First Respondent's Grounds of Resistance) and the Claimant's final submission was that both Respondents were his employer.

Conclusions

As to the identity of the employer

27. The Respondents have both acted as the Claimant's employer/s. The Second Respondent issued him terms and conditions stating that it was the employer, and it allowed its name to be used as employer in the report confirming the dismissal.

28. The First Respondent paid the Claimant, issued payslips to him, through Mr Labridis told him it was his employer in response to a direct question on the point, and then issued a P45 saying that it had been the employer. The First Respondent now accepts it was the employer, although previously it denied it.

29. I find that both Respondents were the employer alternatively the employers of the Claimant at the point that he was dismissed.

30. If I am wrong to find that the Second Respondent was also the employer, then I find that it is in any event estopped from denying that it was also the Claimants employer, as a result of its representations that it was, as referred to above, which the Claimant relied on to his detriment.

As to the Claimant's claimed gross misconduct

31. The email of 29/11/23 shows that Mr Labridis was looking for a pretext to dismiss the Claimant. That in itself does not mean that the Claimant had not been guilty of misconduct, but it does tend to confirm that the complaint about the Claimant's email account was artificial and concocted simply to try to create such a pretext.

32. The Respondent has the onus of proof to show that the Claimant was guilty of gross misconduct on a balance of probabilities. It has not come even close to doing so. The Claimant was authorised to set up the account. No evidence that he mis-used the account has been produced. Since February 24 at the latest he has been offering the Respondent access to examine the account, which offer has not been taken up.

33. Even if (contrary to my actual findings) I had found that the Claimant had not obtained authorisation from his line manager before setting up the gmail account, the employee handbook states that this should have been dealt with as misconduct warranting a written warning rather than as gross misconduct.

[1] Mr Labridi's statement paragraph 4

34. The Respondents were not entitled to dismiss the Claimant without notice and it doing so on 25/1/14 were in breach of contract. The wrongful dismissal claim succeeds.

The Claimant's salary

35. I do not find that the bonus can be included as part of the calculation of contractual damages because the terms and conditions stated it was not part of the contract. The gross salary was £45000 pa gross and £35921.40 pa and £690.79 pw net of tax and NI.

The damages for wrongful dismissal

36. The terms and conditions gave the employer the right to make a PILON but did not impose an obligation on it to do so, so the Claimant's claim is for damages rather than for a contractual payment. The correct measure is the damage caused to him by the dismissal. That had the effect of bringing forward the termination date of the employment contract from 29/2/24 (the date for the expiry of the notice given by him) to 25/1/24, a period of 5 weeks.

37. The loss of net pay was 5 x £690.79 = £3453.98.

38. The Respondent was making contributions to Aviva for the Claimant's pension at the rate of £129.20 per month. Pension loss is £129.20 x 12 = £1549.44 per year /52 = £29.79 per week x 5 = £148.98

39. Total £3453.98 + £148.98 = £3602.96

Section 38

40. The Respondents failed in its duty to provide accurate terms and conditions at the outset of the employment and throughout, in that the name of the employer was given incorrectly as Own Projects Ltd instead of the correct Own Projects Ltd and Own Property Ltd.

41. This caused confusion and difficulty for the Claimant, and the Respondents subsequently tried to take advantage of this in its ET3.

42. However this was not a case in which there were no Terms and Conditions. Detailed Terms and Conditions which regulated the relationship were issued.

43. In the circumstances I find it is appropriate to make an award of 2 weeks' pay under section 38 Employment Act 2002. For this purpose the weeks' pay is based on gross pay. £45000 per year is £865.38 per week. 2 x £865.38 = £1730.76.

Preparation Time Award

44. After I had read out the above reasons I told Mrs Younis that I was considering making a preparation time Order and asked the Claimant to tell me what times he had spent on the matter. He told me that he had spent 40 to 60 hours as an estimate not including time spent at the trial. I decided that it would not be proportionate to adjourn to another day to allow written submissions to be made. I then adjourned for 75 minutes to allow Mrs Younis to take instructions. I then heard oral submissions from her.

45. I accept that the Tribunal is generally a cost-free jurisdiction and that a costs or preparation time order is exceptional.

46. The Respondent's have acted unreasonably in the conduct of these proceedings firstly by contending in the ET3 that Own Projects Ltd was the employer and denying that the First Respondent was the employer and then, without having made any application to amend its Grounds of Resistance, giving evidence and making submissions at the Final Hearing that were the direct opposite of this. This caused confusion and waste of time.

47. Secondly the Respondents acted unreasonably by failing to make it clear that it was not relying on the "two other matters" referred to in paragraph 18 above in seeking to justify the summary dismissal at the Tribunal. One of these matters was particularly serious, being an accusation of theft. The Grounds of Resistance referred to it in detail in paragraph 12(ii) as follows "*It is alleged that on Wednesday 27th September 2023 at 08:29am, the Claimant took home a company computer without reasonable authorisation or excuse to do so."* The Grounds of Resistance in paragraph 20 go on to say in vague terms that "*although the Claimant's appeal is partially upheld, the dismissal on the grounds of gross misconduct is substantiated*". There is no clear statement that the theft accusation was altogether withdrawn for purposes of the wrongful dismissal defence.

48. As a result the Claimant thought that he might have to deal with the theft accusation over again so he obtained evidence about this from Mr Xenos who provided a witness statement including the following "*A few days before 27th September 2023, I had requested that Mr. Giles collect my PC from the office, which he did as requested."*

49. The matter was then compounded when the Respondents witness statements were served on 16/7/23. Mr Labidis' statement in paragraphs 9 and 10 goes into details about the reasons why he claims he thought and continues to think that the Claimant stole a computer.

50. Accordingly, the Claimant spent much time and many sleepless nights worrying about and preparing for the Final Hearing in the reasonably belief that this would be one of the matters he would have to engage with.

51. Finally, and only after the Hearing had started on 24/7/24 Mrs Younis stated clearly that the Respondents in seeking to defend the wrongful dismissal claim, did not seek to rely on the "other matters" including the PC theft accusation. This delay in clearly abandoning a serious accusation caused unnecessary complexity and anxiety.

52. Mrs Younis submitted that the Clamant had himself made an invalid unfair dismissal claim which was only dismissed on withdrawal on 23/7/24. However the Claimant had acted

responsibly regarding that, as he sent a message to the Respondents and Tribunal on 21/5/24 confirming that he was pursuing wrongful dismissal only.

53. Mrs Younis told me that the Respondents had made an offer to the Claimant to settle after the Hearing started. The offer was to pay one months' notice pay. The Claimant declined and said he would settle only for a much higher sum. In the event the sums awarded excluding costs exceed the Respondents' offer which in any event was made very late when all the preparation time had been spent.

54. I asked Mrs Younis whether she wished to tell me anything about the Respondents' ability to pay. She said she did not have instructions about that.

55. As the Respondents conducted the Defence unreasonably, my discretion to make a preparation time order in the Claimant's favour is engaged. As stated above, the Claimant estimates that, not including the trial, he spent 40 to 60 hours preparation time. He told me that but for the additional work caused by the stance the Respondents took as to the identity of the employer and the relevance of the theft accusation, he would have spent considerably less time, perhaps half as much.

56. Any preparation time order does not have to be restricted to the additional costs thrown away by the unreasonable conduct, which is merely a threshold circumstance. The time which rule 79 states should be taken into account in relation to such an award is the preparation time but not the time spent during the final hearing. I find it is proper in all the circumstances to make an award for 40 hours at the current rate of £44 per hour = £1760

Summary

The total amount payable is

Damages for wrongful dismissal	£3602.96
Section 38	£1730.76
Preparation time	£1760.00
Total	£7093.72

Employment Judge J S Burns
24/07/2024
For Secretary of the Tribunals
Date sent to parties
29 July 2024