EMPLOYMENT TRIBUNALS

Claimant: Mr H Waterman

Respondent: Atom Supplies Limited

Heard at: London Central (by CVP) **On:** 21 & 22 March 2024

Before: Employment Judge Emery

REPRESENTATION:

Claimant: In person
Respondent: Mr J Kelly (General Counsel)

JUDGMENT

The judgment of the Tribunal is as follows:

1. The complaint of breach of contract in relation to notice pay is well-founded.

2. The respondent's counterclaim is dismissed on withdrawal.

3. The respondent shall pay the claimant **£2,870.86** as damages for breach of contract. This figure has been calculated using gross pay to reflect the likelihood that the claimant will have to pay tax on it as Post Employment Notice Pay.

REASONS

The Issues

1. Judgment and reasons were given at the hearing, written reasons wererequested.

2. The claimant was employed by the respondent from 14 March 2022 to 23 August2023 as an IT Manager. His initial claim was for unfair dismissal and notice pay; his claim now is for the balance of his notice pay.

3. The respondent is primarily a drinks maker, seller and distributor. It also holdsseveral thousand internet site domain names, the background of the dispute in this claim.

4. At the date of his dismissal for gross misconduct, the claimant was working athree-month notice period, the respondent having given the claimant notice, due to end on 19 September 2023. The respondent says that it found that the claimant had committed gross misconduct in his notice period and dismissed him following an investigation, but no disciplinary hearing. It says it was justified in not having a disciplinary hearing given the nature of the misconduct and the fact the claimant was on notice.

5. The claimant says that the respondent should have followed a disciplinaryprocess, not doing so was in breach of contract; he says that the respondent has not shown he committed misconduct. The claimant claims the remainder of his notice pay - 24 August 2023 to 19 September 2023. **The counterclaim**

6. At the outset of the hearing, we discussed the respondent's counterclaim whichis for the "significant losses" as a direct result of the claimant's actions.

7. Mr. Kelly was not sure of the value of this claim, the respondent had not preparedevidence on this; the CEO was on parental leave, so it was not possible to take instructions. Mr. Kelly said that the respondent was "not aware" it needed to prosecute these arguments at this hearing.

8. After a short break to consider the issue, Mr. Kelly stated that the respondent'scounterclaim was being withdrawn but that the respondent wanted to "reserve its rights" to pursue it. I made it clear that either the counterclaim was being withdrawn or not; if it was withdrawn, it could not be resurrected later.

9. The application to withdraw was not withdrawn and I ordered that thecounterclaim be dismissed on withdrawal by the respondent. **Witnesses and procedural issues**

10. The claimant gave evidence. Mr. Joel Kelly, who heard the claimant's appealagainst dismissal gave evidence for the respondent. Neither had

prepared a witness statement. On day 2 Ms. Marina Warren, the respondent's People Director, who investigated the disciplinary issue gave evidence.

11. No credible explanation was given as to why statements had not been preparedand exchanged. Mr. Petszaft, the respondent's CEO who made the decision to dismiss without a disciplinary hearing, was not available to give evidence as he was on paternity leave.

12. The hearing was further slowed by debates at various points about the law andtribunal procedure. Mr. Kelly professed he had no knowledge of Employment Tribunal procedure or employment law. At the outset of the hearing, he said he was not willing to be the respondent's representative, that they had no representative. This was unacceptable for the conduct of the hearing, and I stated that as a solicitor employed by and speaking on behalf of the respondent, he must be its representative.

13. It became apparent at the end of the claimant's evidence that he was givingevidence from the USA. At this point I stopped the evidence and considered the relevant guidance (Employment Tribunals Presidential Guidance – Taking oral evidence by video … from persons located abroad, dated 27 April 2022). I concluded: (i) the USA is a 'green country'; (ii) notwithstanding this status, there is an administrative process to be followed respect of any witness wishing to give evidence from the USA; (iii) this process had not been followed; (iv) it was unlikely that retrospective permission to give evidence would be allowed.

14. I discussed this with the parties. I concluded that if this hearing continues, wewould not be able to take account of any of the claimant's evidence – it would be a nullity. But there was nothing to stop the claimant asking questions of witnesses and making submissions from the USA. The alternative was abandoning the hearing and relisting, with a potential prejudice in doing so, as questions and evidence will have been rehearsed.

15. The claimant accepted that it was his fault for failing to apply for the appropriateclearance. His view was to carry on with the hearing, that he did not want this to drag on further. He accepted this meant his evidence would be disregarded. The respondent took the same view, Mr. Kelly stated there was no desire to waste time further and to "re-rehearse" evidence from the first day "is not in the best interests of justice".

16. It was therefore agreed that the case would continue, but that the claimant'sevidence would be disregarded in its entirety. The claimant could ask questions and make submissions.

17. A further issue came up because this hearing had been listed for two days, butthe parties had received an Order changing the listing to one day. The evidence was not over by the end of day 1. The parties continued the hearing on day 2, which was appreciated.

18. At the end of day 1, the respondent said that it had a list of 1950 domain nameswhich had expired during the claimant's employment. Mr. Kelly argued that while the respondent "cannot demonstrate a causal link between the claimant and the expiry of all the names" this was relevant evidence of the claimant's decision to remove domain names.

19. The respondent's position was that this was not submitted in evidence earlier as"we did not know these are the focal point" in the case "so we are unprepared in respect of some of these arguments." The respondent says that it needed to show that the process it adopted was not in breach of contract, these documents show the "missing link" to show it did have the material on which to dismiss without a disciplinary hearing.

20. While this documentation was provided late, the respondent insisted on itsrelevance, and the claimant did not object; I therefore allowed the late addition of these documents. **The relevant facts**

21. The claimant was given 3 months' contractual notice of termination ofemployment on 20 June 2023, the claimant's employment to end on 19 September 2023, the respondent says on performance grounds.

22. The respondent says that the act of gross misconduct was the claimant'sdecision to remove or cancel domain names without authorization. The claimant accepted during the disciplinary process that he had been told on various occasions to wait for authorization, and he did not do so, but he says that the picture is more complicated. His case is that his explanations during the investigation were not properly considered or further investigated, there was no disciplinary hearing prior to his dismissal, that these are procedural failures amounting to a breach of contract.

23. What is not disputed is that a significant number of domain names were dropped.The evidence in the bundle shows the following:

a. Claimant in an undated “General thread” (this states the threat is twoyears old, so approx. 2021): “We have gone through about 800ish of these now and only 5-10% of those are being kept so it’s getting better?” There was reference to one example - 3 domain names misspelling Madeira as an example of sites which were being deleted, the claimant stating, “If it’s one of the ones we are binning off…” (65-6).

b. Mr. Petszaft saying in a conversation 17 June 2023: “… the claimantknows what domains because he has been going through them, there are about 4,000 of them… far too many [domains] or not enough, it’s very difficult to tell … (63-4).

c. Weekly diary entries for the claimant from Mr. Petszaft from 2 January to13 February 2023 and 20 March – 11 June 2023 titled “Domains”.

d. Note of meeting on 27 February 2023: the notes state “Domains dropping.[The claimant will call Justin. We have spent over £40k annually on domains not being used. He has removed ones he thinks are not needed.” (72).

e. On 1 June 2023 a meeting notes with the claimant states: “Cancelleddomain list here [a link in the document]. The notes say “Would be good to get clarification on why we are actually keeping some of the domains on the IBS tab as I can’t see the value they are providing to the business. … Lots of domains similar … they may be related to brands we have but are we actually ever going to be doing anything with them? If not, why are we keeping them?”

f. In the same meeting, the claimant is asked to provide a list of domains“you have dropped.” The claimant provided a link to the “expired” tab - the domains that have expired, the ones which are going to expire “the domains are set to not auto-renew so we can just grab the ones we need as and when.”

g. On 5 June 2023 – “Still seeing loads of domains dropping – can youreassure me they’re not?”

h. On 19 June 2023 a note of a meeting with the claimant references“Domain List - review” (69).

24. The claimant ‘s notice of termination dated 20 June 2023 required him to be ongardening leave for his notice period.

25. On 21 August 2023 the claimant was informed he was to attend an "investigationmeeting" the next day because "a number of domain names that were previously held by us were not renewed by you prior to their expiry period." (80).

26. The respondent's allegation at the disciplinary investigation meeting was that Mr.Petszaft had informed the claimant not to let any domains drop "without his

    express written consent…" and was "surprised" when shown a list of expired names.

27. The claimant and Ms. Warren spoke by phone. The investigation notes recordthe following: the claimant accepted he had been told to seek written consent but says that he and Mr. Petszaft had "maybe 20/30 conversations" regarding domains. He said that Mr. Petszaft had "initially" agreed that the claimant would "purge" the list and transfer some to Mr. Petszaft's personal account and delete others. The claimant created two spreadsheets – the first had two options – (1) keep or (2) bin. The 2nd subsequent spreadsheet had 3 options: (1) keep (2) transfer to Justin (3) bin. Both had approximately 4,000 domain names.

28. The claimant's arguments when interviewed by Ms. Warren was as follows:

    a. The issue of the excessive numbers and cost of domain names held therespondent was never properly addressed by Mr. Petszaft, "After 10 weeks of no response from Justin, I took it into my own hands and decided to cancel [domains] that were not right".

    b. He says only cancelled clearly misspelt domain names or names whichwere clearly inappropriate/not relevant to the business, "nextdayweed.co.uk" for example. He did not drop any business-critical domains, or primary domain names, or names linked to the primary domains even if they were misspelt "Mastersofmalt.com" being an example.

    c. "A year later" Mr. Petszaft received lists of dropped names, "as you wouldexpect as 12 months prior, we had gone through this all." Mr. Petszaft said, "I don't agree with how you have done this". Mr. Petszaft said he would go through the 2nd list the claimant had created, he did not do so, "this went back and forth" until he was put on gardening leave. "Justin would say, why have dropped [sic] these domains, we would discuss it, he would back down…".

d. The claimant denied being told to renew all names unless explicitlyinstructed not to do so, he says he was told to renew some domains previously removed, which he did.

e. Business critical domains are held on separate billing accounts with auto-renewal; these are “held separately from crappy domains like next day weed.”

f. An employee prior to the claimant’s employment starting “did a lot of theprep, killing domains, moving domains…”

g. Some domains had been dropped when he cancelled his company creditcard on the payments system because it had automatically taken £15,000 for expired / cancelled domains when he renewed one domain. It took several days to sort this, during which domains would have been dropped, that Mr. Petszaft was fully aware of this issue.

h. At the end of the meeting, he asked for more information on the domainsdropped.

29. The claimant argues that at this interview he was only told “some” domains hadbeen dropped, he was never given the numbers of domains or domain names, and so he was unable to substantively respond. He says many of the cancelled domains were likely to be prior to his start date, some could have been during his gardening leave, or because if the credit card issue.

30. The day after the investigation meeting with Ms. Warren, 23 August 2023, theclaimant was informed by emailed letter that he was being dismissed for gross misconduct – “your admission … you decided to take these actions despite being explicitly told … to not cancel or allow any existing domain names to lapse without his express consent.”

31. While it appears, it was Mr. Petszaft’s decision not to hold a disciplinary hearing,in his absence it was for Ms. Warren to give evidence on why not. Her evidence was:

a. there was a “pattern of behaviour” by the claimant in not properly handlingdomain renewal.

b. even if he was not aware of a platform (Godaddy) hosting therespondent’s domain names it was “his responsibility” to be aware of such issues. In

questioning Ms. Warren, the claimant's case was that he had no handover when starting in role, this platform was never discussed with him.

c. Ms. Warren made recommendations in the investigation which werediscussed with Mr. Petszaft, who then made the decision to dismiss the claimant. She said there was no disciplinary hearing "because the claimant was on gardening leave, we felt this was gross misconduct and the most appropriate step was summary dismissal."

d. Ms. Warren accepted that there was no discussion of specific domainnames at the investigation meeting, but that here were a "few hundred" which the claimant had either deliberately removed, or he had allowed to lapse. She accepted that the letter referred to "a number" of domains that had not been renewed – there is no reference to deliberately remove.

e. Ms. Warren accepted that the respondent's procedure was to have aninvestigation meeting followed by a disciplinary hearing.

f. Mr. Petszaft decided to dismiss the claimant based on his "admission" atpage 82 that he "needed written confirmation regarding dropping domains."

32. Mr. Kelly heard the appeal. He spoke to the claimant and reviewed documentsand spoke to various members of staff before reaching his conclusion to uphold the decision to dismiss for gross misconduct. His evidence: "… And by this time he had been paid for 2 months on gardening leave. And we had elected to forgive holiday [taken but not accrued]. And this is relevant to the act of summary dismissal. He had been paid for a contractual notice period and contractual benefits, so there were limited options to procure a just outcome. ".

Closing arguments

33. Both parties made brief closing arguments, where relevant I have incorporatedtheir comments into the conclusion section below.

The law

34. Relevant case law:
    a. Edwards v Chesterfield Royal Hospital NHS Trust and Botham v Ministryof Defence [2011] UKSC 58, [2012] IRLR 129, [2012] ICR 201. The 'Johnson exclusion' precluded the implied contractual obligation of trust and confidence from applying to dismissal proceedings.

b. East Coast Main Line Co Ltd v Cameron UKEAT/0212/19: the tribunalmust always consider the difference between wrongful dismissal and unfair dismissal and the importance of keeping them separate. Issues of fairness, for example length of service, are irrelevant in considering whether an employer acted in breach of contract. The question here is whether summary dismissal was objectively justified by gross misconduct, not whether the outcome was fair or not.

c. British Heart Foundation v Roy UKEAT/0049/15: "6. Whereas the focusin unfair dismissal is on the employer's reasons for that dismissal and it does not matter what the Employment Tribunal thinks objectively probably occurred, or whether, in fact, the misconduct actually happened, it is different when one turns to the question … for wrongful dismissal. There the question is, indeed, whether the misconduct actually occurred." "8. Just as all contracts of employment contain an implied term on the part of the employer that it will not act without reasonable or proper cause so as to damage or destroy the relationship of trust and confidence which exists, or should exist, between employer and employee, so too the employee may be bound by that term, and is undoubtedly bound by the term that the employee is to provide loyal service to the employer…. In short, if an employee is guilty of repudiatory conduct …. an employer is entitled to dismiss that employee without notice. The employer, by doing so, is not in breach of the contract. It is the employee's breach which causes the termination."

d. Williams v Leeds United Football Club [2015] EWHC 376 (QB): Themotive of the employer in seeking damaging material about an employee is irrelevant; a dismissal is not wrongful even if the employer instigated an investigation in the hope of finding damaging material. There was no evidence that the employer had acquiesced in the conduct and therefore affirmed any breach of contract by the employee.

> "Similarly, if, viewed objectively, the conduct does amount to a repudiatory breach by the employee, then the employer is entitled to rely upon that repudiatory breach as justifying the dismissal irrespective of the employer's motives or reasons for wishing to do so. Consequently, the fact that the club were motivated by consideration of their own financial and commercial interests, and wished to find a reason, and indeed were actively looking for evidence, to justify the claimant's dismissal, does not prevent the club from relying upon conduct amounting to a repudiatory breach as justifying the dismissal…"

e. MacKenzie v AA Ltd [2022] EWCA Civ 901, [2022] IRLR 985: The tribunalwill usually assess damages on the basis of the Lavarack v Woods of Colchester Ltd 'least burdensome to the employer' rule. The Tribunal will assess them on the basis that the employer would have terminated the contract in the least burdensome method permitted under its terms. This usually means dismissal on the contractual minimum notice period, or pay in lieu of notice, to be put in the position the employee would have been in had the contractual termination provisions been performed.

f. Gunton v Richmond-on-Thames Borough Council [1980] IRLR 321:damages for breach of contract may be awarded for a failure to follow a *contractual* disciplinary process, limited to the time such a process may have taken.

Conclusions on the facts and law

35. The claimant argues in summary he was not given a disciplinary hearing and hewas therefore unable to put his case properly, that he at no time prior to dismissal had knowledge of what domains he was meant to have dropped, when how many. The respondent argues in summary that the claimant admitted deleting domains without permission, that this admission is proof of guilt. While the respondent accepts that its normal approach is to hold a dismissal hearing, it argues that it is not in breach of contract in failing to do so “we did not need to hold a disciplinary hearing”, it is “absurd” to say the respondent needed to hold one.

36. I did not accept that there was a contractual right to a disciplinary hearing.However, absent a disciplinary hearing, it is still for the respondent to show that the employee was in repudiatory breach of contract by his actions, justifying summary dismissal. The fact of an appeal is irrelevant as this is after the contract has ended.

37. In submissions, Mr. Kelly disputed the credit card issue as an explanation, saying “it was wrong” to say the claimant’s explanation was valid, arguing that the £15,000 was taken from his card to ensure payments were made … [the claimant] doesn’t say that these were expired domains or stopped before his arrival, it’s not clear on the evidence what he is saying.” He argued that the claimant “should have explained at the time why these names were dropped”. On the suggestion that no actual names were provided to him at the investigation meeting, Mr. Kelly argued “We are talking about domain names.”

38. I concluded that the failure to (i) further investigate the issues raised by theclaimant at the investigation hearing, (ii) hold a disciplinary hearing to allow him to provide his explanations on the relevant domain names, means that the respondent has failed to answer the question of whether the misconduct actually occurred.

39. I did not accept that contractually the respondent could rely on what itcharacterizes as the claimant's admission of misconduct. The claimant's answer 'this is correct' is followed by a 'but', mentions 20/30 conversations regarding the domains and is followed by a long narrative - "Let's go back to the start." The claimant's subsequent answers show that his admission was not absolute – he is *not* admitting to disobeying a written instruction not to delete domain names, as the respondent suggests. This is not an admission of gross misconduct – as the respondent suggests.

40. Instead, the narrative details discussions and engagement between the claimantand Mr. Petszaft which strongly suggest Mr. Petszaft was aware of and had accepted - albeit post deletion - many of the claimant's decisions.

41. During the investigation hearing, the claimant put forward valid potential reasonsfor some of the deletions - it was not him who made that deletion, there was the card issue, he did not have full sight of all the systems holding domain names.

42. Also, the respondent suggests that the claimant's admission was to the deletionof 100s or more of domain names. But at no point in the minutes of meeting does the claimant admit to the same. He admits to deleting around 5 names and gives his explanations for doing so. He argues his explanations are true, and if investigated he would be exculpated. But they were not investigated further.

43. The claimant's explanation on the card payments was not investigated, hisexplanation was on the face of it credible. He did not admit, as the respondent concludes, to deleting 100s of domain names without the respondent's written permission.

44. While the respondent criticizes the claimant for not providing more information inthe investigation meeting, in fact it was the respondent which decided not to provide him details of the domains they were concerned with or fail to investigate the issues he raised at the meeting.

45. I also consider that on the evidence the respondent was motivated to dismisswithout notice for reasons other than the claimant's conduct. Both Mr. Kelly and Ms. Warren's evidence was that the claimant's garden leave influenced their decision to dismiss / uphold dismissal without notice. Ms. Warren suggested that there was no disciplinary hearing because the claimant was on gardening leave; Mr. Kelly said that being on paid garden leave and not repaying holiday pay was "relevant" to the summary dismissal decision.

46. These factors outside the claimant's conduct are extraneous and have nobearing on whether the claimant committed a repudiatory act justifying dismissal. This was, however, one of the stated reasons for dismissing without notice/not upholding the appeal. This was not a repudiatory breach by the claimant. In dismissing without notice for such a reason the respondent acted in breach of contract.

47. It follows that the respondent's failure to investigate the claimant's explanationsat the investigation meeting and then not holding a disciplinary hearing, means it has not shown that summary dismissal was objectively justified - it has not shown on the balance of probabilities that the misconduct occurred.

Remedy

48. The claimant was paid until 23 August 2023. His claim is for pay for theremainder of his notice period – 24 August 2023 to 19 September 2023. The claimant started a new role on 11 September 2023. This means his losses are to 10 September 2023.

49. It was agreed that the claimant's gross salary from 24 August to 10 September2023 was £2769.24 and employer pension contributions of £101.62, a total of **£2,870.86**.

50. After this decision was given to the parties but prior to the end of the hearing, Mr.Kelly argued that the claimant is now on a higher salary from 11 September 2023 and should therefore give credit from this to his losses prior to 11 September, that failing to do so amounts to an "error of law". I disagreed that this was an appropriate approach: the respondent is not entitled to claw back from the claimant the benefits he is now accruing in his current employment, instead the claimant has appropriately mitigated his losses.

51. Mr. Kelly was so firm in his objection that I allowed the respondent 20 minutes tocome with the appropriate authority; Mr. Kelly did so, citing Re Crowther & Nicolson Ltd 1981.

52. Mr. Kelly suggested that his argument was a “natural and legal extension” of theRe Crowther principle. When I suggested otherwise, Mr. Kelly argued that I was putting the respondent “at an unfair burden” in asking it to justify its legal position.

53. On reviewing this case, I found nothing which suggested that an employer shouldbe entitled to discount from a period of total financial losses a higher income received thereafter. I therefore awarded the claimant the sum for his total loss of earnings and employer pension contributions for the period 24 August to 10 September 2023.

Employment Judge Emery
20 June 2024

Judgment sent to the parties on:
1st July 2024

For the Tribunal Office:

P Wing

Note
Reasons for the judgment were given orally at the hearing. Written reasons will not be provided unless a party asked for them at the hearing or a party makes a written request within 14 days of the sending of this written record of the decision.

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