



# EMPLOYMENT TRIBUNALS

**Claimant:** Timothy Walker

**Respondent:** Taylor Made Computing Solutions Ltd

**Heard at:** Southampton                      **On: Monday, 27<sup>th</sup> to Thursday**  
Employment Tribunal                      **30<sup>th</sup> November 2017**

**Before:** Employment Judge Mr. M. Salter

**Representation:**

Claimant: Mr. A. Gloag of Counsel.

Respondent: Mr. T. Forer of Counsel.

## RESERVED JUDGMENT

The Claimant's claims for constructive dismissal fails and is dismissed.

The tribunal has no jurisdiction to hear the Claimant's unlawful deduction from wages claim.

## REASONS

Introduction

1. These are my reasons for the reserved judgment above.

Background

*The Claimant's case as formulated in his ET1*

2. The Claimant's complaint, as formulated in his Form ET1, presented to the tribunal on 22<sup>nd</sup> March 2017, is, in short, that owing of the conduct of the Respondent he resigned in circumstances where he was permitted to treat himself as dismissed, and that he was not paid what he was lawfully entitled to for a period of his employment and this was an unlawful deduction from his wages.

*The Respondent's Response*

3. In its Form ET3, dated 21<sup>st</sup> April 2017, the Respondent denied that the Claimant was entitled to resign and claim he as constructively dismissed or that he was entitled to the money he claims was unlawfully deducted.

*Case Management to date*

4. The matter came before Employment Judge Kolanko on 4<sup>th</sup> September 2017. This was to be a Final Hearing but was turned into a Preliminary Hearing. At this Preliminary Hearing, the Claimant's claims were identified and Case Management Orders given; these included the provision of a Schedule of Breaches. This was provided, and was commented on by the Respondent in a later document.
5. At the Preliminary Hearing the matter was listed for a Final Hearing with a four-day time-estimate (with reserved judgment) to be heard on 27, 29-30 November and 1<sup>st</sup> December 2017.

The Final Hearing

6. This matter came before me for the Final Hearing.

*Representation*

7. The Claimant was represented by Mr. Gloag of counsel, whilst the Respondent was represented by Mr. Forer of counsel.
8. At the outset of the hearing I raised that I know Mr. Gloag and, indeed, am in Chambers with him. Mr. Forer did not object to me continuing to hear the claim and stated it was not an problem for his clients. It appeared to me that he had been notified by Mr. Gloag of our relationship in advance of the hearing commencing.

*Listing*

9. Owing to other commitments I was unable to sit on the 1<sup>st</sup> December 2017. The parties were informed of this in the week commencing 20<sup>th</sup> November and there was some debate and dispute as to if and how the hearing would proceed. The matter remained in the list. I am happy to say that by the time the matter was called on on Monday, 27<sup>th</sup> November these issues had been resolved and the hearing was able to proceed over the four days from 27<sup>th</sup> November to the 30<sup>th</sup> November 2017 inclusive.

*The Hearing's Progression*

10. I heard evidence on Monday, 27<sup>th</sup> to the 30<sup>th</sup> November 2017 and submissions on that last day.
11. Owing to the nature of the matter to be decided I wished to have time to reflect on the submissions and evidence I had heard and so, in line with the Preliminary Hearing Order, I reserved judgment.

Documents, Evidence and Submissions

*Witness Evidence*

12. I heard evidence from the following witnesses on behalf of the Claimant: the claimant himself; Mr. Michael Jenkins; Mr. Peter Hughes; Mrs Anna Vallis; Mr. Llewellyn Rhys Mearle; Mr. Richard Flanders; and Mr. Shaun Frohlich. All witnesses, apart from Mr. Frohlich, were ex-employees of the Respondent.
13. I was provided with witness statements from the following people on behalf of the Respondent: Mr. Nigel Taylor; Mrs Alison Taylor; Mr. Joe Jeffers the Respondent's Finance Director; Mr. Darren Thompson of Meridian Corporate Finance a company who assisted the Respondent with various strategic aims; and Mr. Stephen Porter a solicitor and partner at Shoosmiths LLP who advised the Respondents on various matters. Mr. and Mrs Taylor are married and are the majority shareholders in the Respondent.
14. All witnesses gave evidence by way of written witness statements that were read by me in advance of them giving oral evidence. All witnesses who gave evidence were cross-examined. I heard oral evidence from all of these witnesses apart from Mr. Porter as, I was told that after discussions between the parties, the Respondent was not seeking to rely on Mr. Porter's evidence. I put this statement from my mind.
15. I should say in passing that all the major witnesses in this matter demonstrated an ability to fail to answer the questions asked and instead insisted on giving speeches which they hoped advanced their agendas in this matter. This did not help the consideration of any party's respective positions.

*Bundle*

16. To assist me in determining the claims I had before me an agreed bundle originally consisting of some 373 pages (albeit there were additional pages numbers Xxi, ii etc.) prepared by the Respondent. Additional pages 374 to 384 were added on the last day of the hearing. My attention was taken to a number of these documents as part of me hearing evidence and, as discussed with the parties at the outset of the hearing, before commencing the evidence, I have not considered any document or part of a document to which my attention was not drawn.
17. I refer to this bundle by reference to the relevant page number in squared brackets.

*Submissions*

18. I did not have any written skeleton arguments provided to me. Both parties made their arguments orally.

The Issues

19. Whilst there was no list of issues in this matter the parties had complied with E.J. Kolanko's requirement for a Schedule of Breaches [44iv] and Response to that Schedule [44vi]. From these documents and the pleadings, the issues therefore appear to be:

Qualification

1. The Respondent accepts the Claimant is an employee and has sufficient continuous employment to claim protection from unfair dismissal.
2. The Claimant alleges he was constructively dismissed, the Respondent denies this

Breach of Contract by the Employer

3. Whether the Claimant was constructively dismissed in accordance with the provisions of section 95(1)(c) of the Employment Rights Act 1996; namely was there conduct by which the Respondent that amounted to a fundamental breach of contract.
4. The Claimant relies on the following allegations [44iv]:
  - a) Unilateral deduction of salary in December 2014;
  - b) Removal of the marketing and new Business Team responsibilities on 8<sup>th</sup> January 2016;

**Case Number: 1400490/2017**

- c) Nigel Taylor's response regarding the Claimant's dividend in February/March 2016
  - d) an email regarding the implementation of a new commission schemes (commencing 1<sup>st</sup> June) on 24<sup>th</sup> May 2016;
  - e) covert meeting arranged between Alison Taylor, Steve Stokes and Richard Flanders in June 2016;
  - f) Nigel Taylor paying himself a £10,000 dividend when the IT Lab deal was failing in June 2016;
  - g) removal of Finance function responsibilities in June 2016
5. The Claimant alleges these amount to breaches of the implied duty of trust and confidence and the express terms relating to his salary.
  6. The Claimant's case as presented in his ET1 was a last straw case. the Claimant's ET1 expressly pleads that the "last straws":

"were the payment of the dividend, as well as the finance function being taken away from him, further to the other areas of responsibilities which were diminished"

[17 §20]

This was clarified at the Preliminary Hearing however that the last straw was identified as:

"removal of the finance function from the Claimant in June 2011 which prompted his resignation on 21 June 2016..."

7. The Respondent denies these occurred as alleged by the Claimant, and if they did it denies that these amount to breaches of the implied duty of trust and confidence.

Is the Breach Sufficiently Serious to Allow the Employee to Resign?

8. Has the Claimant showed that objectively considered these:
  - a. were calculated or likely to destroy or seriously undermine the necessary trust and confidence in the employment relationship, or
  - b. amount to a repudiatory breach of the express term relating to his salary

Quality of the Act

9. Did the employer have reasonable and proper cause for that conduct?

Effect of the Act

10. Did the Claimant terminate their employment as a result of the breach?

Waiver of Breach

11. Did the Claimant waiver any breaches when terminating their employment?

Would any Actual Dismissal have been Fair?

12. If it is found that the Claimant's resignation did fall within the provisions of section 95(1)(c) ERA, entitling him to resign, and that his resignation amounted to a dismissal, whether this whether any constructive dismissal was also an unfair dismissal having regard to the provisions of section 98 of the Employment Rights Act 1996: namely consideration that the Respondent had lost trust and confidence in the Claimant as managing Director and would have dismissed him [40 §30].
20. I should point out that the 2011 date referred to for the removal of the Finance function last straw in the Preliminary Hearing Order must be a typographical error as the Claimant did not commence employment with the Respondent until 2014 and the date of the alleged removal was not until 2016. I have taken the date to read "June 2016".
21. There were no applications to amend the pleadings, the Schedule of breaches or response to that Schedule before or during the hearing.

#### The Material Facts

22. From the evidence and submissions, I made the following findings of fact. I make my findings after considering all of the evidence before me, taking into account relevant documents where they exist, the accounts given by the numerous witnesses in evidence, both in their respective statements and in oral testimony. Where it is has been necessary to resolve disputes about what happened I have done so on the balance of probabilities taking into account my assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the evidence including the documentary evidence. In this decision, I do not address every episode covered by that evidence, or set out all of the evidence, even where it is disputed. Rather, I have set out my principle findings of fact on the evidence before me that I consider to be necessary in order to fairly determine the claims and the issues to which the parties have asked me to decide.

#### *The Parties*

23. The Claimant was engaged by the Respondent as a consultant. From 1<sup>st</sup> September 2014 [5 §5.1] he was then employed as the Managing Director ("MD") of the Respondent.

24. The Respondent is a limited liability company who specialise in IT service provision delivering professional IT solutions for businesses, education and public-sector organisations based in and around Central Southern England [30 §2].
25. The Respondent traditionally had provided IT services that appeared to consist of one-off purchases (e.g. the installation of systems). With the drive to off-site housing such as the cloud the Respondent wished to increase their recurring income streams for example, by charging retainers for services.
26. The Respondent's majority shareholders are Mr. Nigel Taylor and Mrs Alison Taylor. They are married to one-another.
27. There Respondent has a board of directors. A number of positions report to that board: the MD is one of them. The directors are all part of an email group entitled "Buck" (as "the buck stops with them").

*The MD Role*

28. The MD is reported to by various other employees. One of whom is the Finance Director ("FD").
29. The MD has a position on the Board of Directors. He, like all other members of the Board, has to "take the Board with him" if he wished for the board to approve a proposal of his. If there were disagreements on matters there would be discussions. Those discussions may be robust and challenging ones, as one would expect at such a high level.

*The FD*

30. Mrs Anna Vallis was employed by the Respondent in March 2015; initially as a Financial Controller. She became Financial Director on 1<sup>st</sup> December 2015 and remained in that role until her resignation on 18<sup>th</sup> April 2016. After her resignation, the FD role was filled by Mrs. Taylor as an interim position. Mrs Taylor had occupied the FD role prior to Mrs Vallis's appointment. Mrs Taylor was replaced in this role by the permanent replacement: Mr. Joe Jefers in September

2016 (which was after the Claimant had resigned but before his employment ended).

31. The finance team report to the Finance Director who, as I say above, reports to the MD. The FD also attends board meetings and gives financial reports to the board personally.
32. Responsibility for the finance team was, I find, with the FD. The Finance Team reported to the FD. This was the evidence I heard from Mrs Taylor and, indeed, the Claimant himself explained in evidence that when Ms. Vallis left he wanted the finance team to “move to him” rather than have a new FD appointed. This indicates the team was not his whilst Ms. Vallis was in post.

#### Unilateral deduction of salary in December 2014

33. The Claimant accepted in evidence that there was nothing in writing to document the breakdown in his earning being £120,000.00 in salary and a further £60,000.00 as a dividend. He was clear before me that he wanted £10,000.00 per month in salary with the rest as a dividend.
34. His dividend was paid on the basis of him being a shareholder.
35. The figure changed in the letter [98] the Respondent produced during the proposed buyout of the Respondent by Timco, as the Claimant wished to protect his dividend which he said he feared may not continue if the Respondent was bought out. The witnesses called by the Respondent accept this letter was produced but that there was no intention that this would reflect the position of the claimant’s earnings moving forward, should the buyout fail.
36. For the two months the Timco buyout was taking place the Claimant received £15,000 per month in salary (that is £180,000 divided by 12)
37. The buyout failed. And the Claimant salary payments reverted to £10,000 per month which they had been prior to the change referred to above.



38. In support of the Respondent's position is the fact that in September and October 2014 the Claimant received a payment by way of salary equivalent to £180,000.00 per annum. This is reflected in an email from Mrs Taylor to Mr. Porter [132]. In November 2014, the Claimant accepted the structure of his payments returned to a salary of £120,000.00 per annum with £60,000.00 being paid as a dividend. This is corroborated by the figures on [139] which were emailed to the Claimant on 20<sup>th</sup> January 2015.
39. The Claimant was to be paid the £60,000.00 by way of dividend in 2014 and 2015 [138]
40. There is other contemporaneous documentation supporting the Respondent's contentions: On the 10<sup>th</sup> December 2015, the Claimant signed a SIPP Additional Contribution Form indicating his salary was £120,000.00 per annum [157]. Indeed, he completed a document in compliance with s412(5) of the Companies Act 2006 in which he stated his salary "including any bonuses: was £120,000 for the year ending 30 November 2015.
41. At no point prior to his resignation did the Claimant ever complain about not being paid the £60,000.00 per annum he now says was unlawfully deducted from him. I find that this is because the Claimant understood he was to be paid a dividend, which necessarily depends on the performance of the company.
42. I find, therefore the Claimant's remuneration was £120,000.00 salary with £60,000 to be paid by dividend.
43. Initially the relationship between the Claimant and Taylors was good with a strong bond of trust. However, at some point this relationship soured. Mr. Walker says it was after he queried various expense claims Mr. and Mrs Taylor had put through the Company's accounts.

Removal of the marketing and new Business Team responsibilities on 8<sup>th</sup> January 2016;

44. In late 2015 Mr. Taylor had concerns over the manner in which the New Business Team was operating. In his view, they seemed to be focusing on account maintenance rather than obtaining new business.

45. Mr. Taylor took it upon himself to provide mentoring to the team to move their focus onto obtaining new business. Part of his analysis showed that the existing commission structure under which the New Business team operated did not incentivise obtaining new business, and so he proposed in late 2015 discussions over the realigning of the commission structure with the obtaining of new business.

46. At no time was responsibility for the New Business Team removed from the Claimant. I am told by Mr. Taylor, and see no evidence to contradict this view, that the Claimant's name remained on the New Business Team board packs and it was always the Claimant's responsibility to report to the board about the New Business Team.

Nigel Taylor's response regarding the Claimant's dividend in February/March 2016

47. The Claimant was not paid his dividend in 2015 (and this forms part of his Unlawful Deduction from Wages claim). This is because, the Respondent contends the trigger for the dividend was not met and so there was no liability to pay it. The Claimant does not appear to have queried this until his resignation letter [215, which is Mr. Taylor's response, refers to this].

48. The Response from Mr. Taylor seems perfectly appropriate, and I was not told by the Claimant it was inappropriate.

An email regarding the implementation of a new commission schemes (commencing 1<sup>st</sup> June) on 24<sup>th</sup> May 2016;

49. As stated above in late 2015 the Respondent became unhappy with the basis on which the New Business team's bonuses were calculated. From his evidence before me I was told that the matter was raised with the Claimant in December 2015.

50. In February 2016 [172] Mrs Vallis sent an email to Buck querying if any more information was required from her regarding "a new commission scheme". Mr. Taylor responded the same day referring to his "suggestions" of a new scheme. This email was also sent to Buck.
51. It was not until mid-May 2016 that Mrs. Taylor sent the email [195] regarding commission payments to Mrs Vallis. In one of her responses Mrs Vallis cc's the Claimant into the discussion, and Buck were included in the discussion.
52. What is clear is that the commissions structure was not, in fact, changed at this stage or before the Claimant's resignation. The Claimant did not resign at this stage as he had a conversation with Mr. Taylor about this and so felt able to continue working. Openly, he told me that this was not enough to make him resign.
53. What the Claimant perceived to be "interference" by the Taylors continued and in particular the emails of [198] were referred to. These, I find, are perfectly normal, if somewhat robust, discussions that one would expect to take place amongst directors on a board of a company,

Covert meeting arranged between Alison Taylor, Steve Stokes and Richard Flanders in June 2016;

54. By June 2016 an issue had arisen concerning Mr Richard Flanders and his conduct towards other employees. I make no findings about this and indeed have heard nothing about the factual underpinnings of this allegation.
55. Mrs Taylor, in her role as HR lead for the Respondent, called a meeting with Mr. Flanders and Mr. Steve Stokes, who escalated the complaint to her. Mrs Taylor decided to hold the meeting off site.
56. In April 2016 when the matter was first raised with her Mrs Taylor sent an email to the Buck email group [182]. The Claimant was a member of this email group and so, I find, was sent this email. There was no objection to the approach proposed by Mrs Taylor.

57. I am told by Mrs Taylor that this meeting took place in May 2016 and not in June as the Claimant states. Mr. Flanders refers to spring 2016. I do not consider that anything really turns on the meeting's date.
58. Mr. Flanders said in evidence that the Claimant was aware of this meeting. In his witness statement at paragraph 2 he is clear that the meeting related to "a HR matter". HR was Mrs Taylors remit and not the Claimant's. Mrs Taylor accepts that she told Mr. Flanders "not to go running back to [the Claimant]" as she did not want him to undermine the approach she had taken to resolving the HR issue she had.
- Nigel Taylor paying himself a £10,000 dividend when the IT Lab deal was failing in June 2016;
59. As majority shareholders, the Taylors received payment by way of dividends. These are paid on quarterly basis and are agreed at the start of the financial year. The structure of these payments is that the dividends are paid into a Directors Loan account and Mr. and Mrs Taylor make withdrawals from this account on a monthly basis and ensure that there is enough money in that account to cover any tax liability those sums are subject to.
60. It is accepted that the Taylors withdrew £10,000.00 from the loan account as they are entitled to do.
61. From the records maintained by the FD at the time it appeared that the Loan Accounts had sufficient money in for the Taylors to make a withdrawal. This was explained to the Claimant [215]. The reality of the situation was, I am told, different: the records were inaccurate and there was not sufficient money in the Account to cover the tax liability and the withdrawal.
62. I Have heard evidence that Mr. and Mrs. Taylor were unaware of this error in the records. I accept this is correct.
63. The Claimant cites this as a reason for his resignation [209] as "at the very least a breach of the spirit of the relationship we came into".

The Law

*Statute*

64. So far as is relevant the 1996 Act states:

**27 Meaning of “wages” etc.**

- (1) In this Part “wages”, in relation to a worker, means any sums payable to the worker in connection with his employment, including—
- (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,
- ...
- but excluding any payments within subsection (2).
- (2) Those payments are –
- ...
- (e) any payment to the worker otherwise than in his capacity as a worker.

**95 Circumstances in which an employee is dismissed**

- (1) 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.

*Authorities*

65. I was not referred directly to any authorities by either party. However, I remind myself that the Court of Appeal in London Borough of Waltham Forest v Omilaju [2005] IRLR 35, note that the last straw does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial. Thus, if an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence but the employee does not resign and affirms the contract, he cannot subsequently rely on those acts to justify a constructive dismissal if the final straw is entirely innocuous and not capable of contributing to that series of earlier acts: Salford NHS Primary Care Trust v Smith [2011] 0507/10 EAT.

66. This is to be judged objectively.
67. The Respondent accepted that any breach of the implied duty of trust and confidence is repudiatory: Morrow v Safeway Stores [2002] IRLR 9, EAT; and that a more than trivial change to the obligation to pay is repudiatory: this would include a unilateral variation in pay is a repudiatory breach (see for instance RF Hill Ltd v Mooney [1981] IRLR 258, EAT.
68. It is for the employee to accept the repudiatory breach for the contract to come to an end. The employment does not end automatically upon the breach: Societe Generale, London Branch v Geys [2013] IRLR 122, SC.

### Conclusions on the Issues

#### *General*

69. I took time assessing and looking through my notes of the cross-examination as well as the written statements and documents, I considered with care the submissions, the legal provisions and guidance in case law. Having made the findings of fact set out above, I made these conclusions.

#### *Constructive Dismissal*

70. In light of the evidence I heard when considering the constructive dismissal claim I first considered what was the “last straw” as this, in light of the law and depending on my conclusion, may be determinative of the constructive dismissal claim.

#### *(1) What is the “last straw”?*

71. One of the questions for me is to determine what was the reason for the Claimant’s resignation. The Claimant’s case here was confused so I had to determine what was the last straw as whilst these, seemingly, had been pleaded in the ET1 and then identified in the Preliminary Hearing and Schedule of Breaches ordered by E.J. Kolanko, whilst giving evidence the Claimant’s case changed. In evidence he was clear that, to use his words, “what triggered his resignation” was a discussion about business cards. This differs from the last straws as identified in the ET1 and the PH/Schedule of Breaches: the ET1 identifies the payment of the dividend and removal of the finance function as the last straw whilst the removal of the finance function is the last straw according to the Preliminary Hearing Order and Schedule of Breaches.

72. Looking at the contemporaneous material I was taken to and the evidence of the Claimant before me I find that the Claimant resignation was triggered by the discussion about business cards and the decision taken by Respondent to approve a different card than that which the Claimant had proposed. The Claimant resigned in the email at [201], this is an email chain directly concerning the business card issue, and in a letter subsequent to that resignation on 27<sup>th</sup> June 2016 the Claimant sets out that his resignation “may appear a knee jerk reaction to something relatively trivial this last week”.
73. This I find supports the Claimant’s oral evidence before me that the business cards issue was the trigger. This was not identified anywhere by the Claimant as a matter he complains about in his claim presented to the tribunal.
74. On the material before me therefore this is I find on the balance of probabilities the cause of the Claimant’s resignation. His claim of constructive dismissal fails as the cause, the business cards, is not identified as a breach of contract or last straw, yet this caused his resignation.
75. In case I am wrong on this, then I also considered the last straw identified by the Claimant in his pleadings and at the Preliminary Hearing, namely the “removal of the finance function” from him. I do not find that this occurred. The evidence I have heard was that the FD position gave reports to the MD and the board, but that the FD reported to the Managing Director in so far as the hierarchy of the business was concerned and line management. This was the evidence of the Respondent and was conformed to me by the Claimant in cross-examination who was explicit that the Finance Director’s reporting line was to him as MD.
76. The FD role was occupied by Mrs Vallis and then Mrs. Taylor. The evidence I have heard and which I accept, was that at all times the FD role reported to the Claimant.
77. The Claimant never had the finance function “removed” from him; at most what occurred was the person occupying the Financial Director role changed. The

Claimant in cross-examination confirmed that the finance team “should have been handed over to him”. The Claimant’s real complaint appears to be that he did not think that the Respondent needed an FD, or that he did not approve of Mrs. Taylor’s appointment as FD as he, in his view, should have been undertaking the Financial Director’ functions when Mrs. Vallis left.

78. I remind myself that the last straw does not have to be of the same character as the actions that have gone before, nor need it constitute unreasonable or blameworthy conduct by the Respondent. I have not heard any evidence as to why the Claimant feels the Respondent was in at fault in not transferring the finance function to him, or that the maintenance of the status quo of the FD reporting to the MD was anything other than innocuous. I find as a matter of fact that the appointment is an innocuous act, even though the Claimant appears to have perceived it as harmful to the relationship he had with the Respondent; I note in passing the evidence the Claimant has presented on this, however, is sparse.
79. Viewed objectively, therefore, I find the acts complained of by the Claimant relating to the business cards and the FD role are reasonable and justifiable actions by an employer
80. Even if, therefore, what occurred before either of these “last straws” was a breach of the implied term of trust and confidence the Court of Appeal guidance in Omilaju makes it clear the employee cannot rely on those acts when the final straw is innocuous. Therefore, I reject the Claimant’s case (however it is advanced) that there was an operative last straw. As such he cannot rely on those other preceding acts to bring a claim of constructive dismissal.
81. The Claimant’s constructive dismissal claim fails.

(2) *Other Breaches*

82. In light of the above conclusion it is unnecessary for me to consider or assess the impact and effect of the other alleged breaches relied upon by the Claimant in support of his constructive dismissal claim, however, I will make the following brief comments on these alleged breaches of contract



*Unilateral deduction of salary in December 2014*

83. Understandably there was extensive cross-examination on this point. Throughout his answers and when pushed for clarification on this point the Claimant repeated time-and-time again that he was to be paid £120,000.00 per annum as salary and a further £60,000.00 as a dividend.

84. If the deduction is said to have occurred after the failed Timco buyout I reject this allegation. The evidence I have heard which I accept is that of the Respondent's witnesses that it was the Claimant who requested a letter be drawn up showing a salary of £180,000.00 in order to protect the £60,000.00 that, until then (and for that matter after then) was paid by dividend. The contemporaneous documentation appears to support this breakdown in the payments he received.

*Removal of the marketing and new Business Team responsibilities on 8<sup>th</sup> January 2016;*

85. As is set out above, on the evidence I have heard, this did not occur.

*Nigel Taylor's response regarding the Claimant's dividend in February/March 2016*

86. I have found as a fact the Claimant did not ask for his dividend or make reference to an alleged underpayment by the Respondent until his resignation letter. As such I prefer the evidence of the Respondent, that there was no request and so there was nothing for Mr. Taylor to respond to.

*An email regarding the implementation of a new commission schemes (commencing 1<sup>st</sup> June) on 24<sup>th</sup> May 2016;*

87. Clearly there was an email concerning the implementation of the new commission scheme. In its terms, it does not appear to me to be objectionable and when put into context of an ongoing and documented assessment of the commission scheme is not, I find, troubling. Indeed, I remind myself that the commission scheme was never implemented after this email owing to the ongoing discussions concerning it.

*Covert meeting arranged between Alison Taylor, Steve Stokes and Richard Flanders in June 2016.*

88. There was a meeting between these three individuals, that meeting was off site. I find nothing inherently objectionable to that in light of the sensitive nature of the subject matter.
  
89. Mrs Taylor accepts she said words to the effect that Mr. Flanders "should not go running back to the Claimant". These are unfortunate words to use and I can see why the Claimant felt he had been excluded from this meeting with that language. However, the evidence I have satisfies me that this was a meeting concerning HR matters between Mr. Flanders and MR. Stokes. At this point it had nothing to do with the MD.
  
90. Whilst an unfortunate turn of phrase I do not consider Mrs Taylor had any motive or reason for saying it other than the reason she gave me.
  
91. I do not consider that this meeting amounts to a covert meeting, if there is any criticism meant by the Claimant in the use of the term "covert".
  
92. A meeting took place, the Claimant was not present or invited. This decision was a reasonable and proper one for the Respondent to make.

*Nigel Taylor paying himself a £10,000 dividend when the IT Lab deal was failing in June 2016.*

93. Mr. Taylor did take a £10,000.00 payment from the Directors Loan Account. This he is entitled to do. The circumstances of that payment do not amount to a breach of the implied duty of trust and confidence. The error over the levels of available money in those accounts have been explained to me and were not challenged.

*Removal of Finance function responsibilities in June 2016*

94. This did not occur, at all times the FD reported to the MD. There is no breach of contract.

*Conclusion*

95. The effect of my findings on the above alleged breaches is that none of them by themselves would amount to a repudiatory breach of contract. Further when

taken together they would not be sufficient to amount to a repudiatory breach, had there been an operative last straw.

*Unlawful Deduction from Wages*

96. In his evidence before me the Claimant was clear that his salary was £120,000 gross per annum with the remaining payable £60,000.00 as a dividend. He repeated this a number of times. Indeed, this appears to be the Claimant's case as set out in his witness statement at paragraphs 8-10.

97. The Respondent agrees and says that this £60,000.00 payment is dividend.

98. A dividend is paid to a share-holder qua shareholder and not, necessarily to a worker, although I accept that a worker can be a shareholder, the two capacities are entirely independent of one another.

99. As such, as urged on me by the Respondent, it appears to me that s27(1) and (2) of the 1996 Act provides the answer to this claim:

**27 Meaning of "wages"**

(1) In this Part "wages"...means any sums payable to the worker in connection with his employment

...

but excluding any payments within subsection (2).

(2) Those payments are:

...

(e) any payment to the worker otherwise than in his capacity as a worker.

100. Whilst a dividend in this case could be "a sum payable in to the worker in connection with his employment" and so would fall within s27(1) of the 1996 Act, that subsection is made expressly subject to s27(2). Subsection (2) includes any payment to the worker otherwise than in his capacity as a worker. The dividend is paid in the Claimant's capacity as a shareholder.

101. I therefore have no jurisdiction to hear the claim for unlawful deduction from wages under s23 of the 1996 Act.

102. As noted by the Respondent, there was no claim presented for breach of contract and so I am not able to investigate whether the terms of that contract had been broken by the non-payment of the dividend in the circumstances of this matter, and so I make no findings in that regard.

Conclusions on the Complaints

103. The Claimant's claim of constructive unfair dismissal is dismissed. The Tribunal has no jurisdiction to hear the unlawful deduction from wages claim.

---

Employment Judge Salter

---

Date 6 January 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

10 January 2018