



EMPLOYMENT TRIBUNALS

Claimant

Respondent

v

Daniel Kellet

Day Tanner Limited

Heard at: Watford

On: 17 June 2021 and 5 July 2021

Before: Employment Judge Anderson

Appearances

For the Claimant: Anne Kellet (lay representative)

For the Respondent: Jody Sallons-Day

JUDGMENT

1. The Claimant's claim of constructive unfair dismissal is upheld.
2. The Claimant's claim of wrongful dismissal is upheld.
3. The Claimant's claim for unpaid holiday pay is upheld.
4. The claim will be listed for a remedy hearing.

REASONS

Introduction and Issues

1. The Claimant, Daniel Kellet, brings a claim of unfair dismissal. He claims that the behaviour of the Respondent during the period 29 May 2019 to 23 July 2019 when he resigned, amounted to a fundamental breach of contract leaving him no option other than to resign. He also relies on an incident that took place on 15 April 2019, in which he says that he was harassed by the Respondent. The Respondent denies that the Claimant was forced to resign on 23 July 2019 and states that he was dismissed by Tony Day, one of the Respondent's two directors, on 29 May 2019 due to gross misconduct – namely setting up his own business which competed with the Respondent and using the Respondent's resources, including time, on that business. The Respondent contends that the dismissal on 29 May 2019 was fair and that the Claimant was not harassed.

2. A preliminary hearing took place on 27 May 2020 at which a list of issues for the tribunal to consider was agreed. The list, as it appears in the order of 27 May 2020 is:

Unfair dismissal

2.1 It is not in dispute that Mr Tony Day, on behalf of the respondent, purported to dismiss the claimant on the 29 May 2019.

2.2 The claimant contends that he was reinstated and that the dismissal was not effective, and his employment continued until 23 July 2019 when the claimant resigned his employment.

2.3 The claimant contends that he was constructively dismissed within the meaning of section 95 (1) (c) Employment Rights Act 1996.

2.4 Was the claimant dismissed on the 29 May 2019?

2.5 If the claimant was dismissed on the 29 May 2019 what was the reason for the claimant dismissal? Was it a potentially fair reason for dismissal under section 98 (1) and (2) Employment Rights Act 1996?

2.6 If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

2.7 Was the claimant constructively dismissed?

2.7.1 The claimant contends that the respondent's conduct in the period from 29 May 2019 (including the purported dismissal) until 23 July 2019 amounted to a fundamental breach of contract.

2.7.2 In addition, the claimant relies on the following matters:

2.7.2.1 The claimant will say that he was harassed on the 15 April 2019;

2.7.2.2 That the claimant's health insurance was cancelled on the 22 May 2019;

2.7.2.3 Failing to reinstate the claimant on PAYE;

2.7.2.4 Preventing the claimant having access to a computer (laptop) and software (office 365 and Autodesk) necessary for the claimant to carry out his role.

2.7.3 Did the matters set above amount to a fundamental breach of contract?

2.7.4 Did the claimant resign in response to that breach?

2.7.5 Did the claimant affirm the breach or wait too long before resigning?

2.8 If the claimant was constructively dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (“ERA”); and, if so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called ‘band of reasonable responses’?

Remedy

2.9 If the claimant was unfairly dismissed and the remedy is compensation:

2.9.1 if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed or have been dismissed in time anyway? See: *Polkey v AE Dayton Services Ltd* [1987] UKHL 8; paragraph 54 of *Software 2000 Ltd v Andrews* [2007] ICR 825; *W Devis & Sons Ltd v Atkins* [1977] 3 All ER 40; *Crédit Agricole Corporate and Investment Bank v Wardle* [2011] IRLR 604;

2.9.2 would it be just and equitable to reduce the amount of the claimant’s basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

2.9.3 did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

Breach of contract (Notice Pay)

2.10 To how much notice was the claimant entitled?

2.11 Did the claimant fundamentally breach the contract of employment by an act of so-called gross misconduct? [N.B. This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the gross misconduct]; if so, did the respondent affirm the contract of employment prior to dismissal?

Holiday pay

2.12 When the claimant’s employment came to an end, was he paid all of the compensation he was entitled to under regulation 14 of the Working

Time Regulations 1998 and or his contract of employment in respect of holiday pay?

The Hearing

3. At the commencement of the hearing I discussed with the Claimant his requests for reasonable adjustments within the hearing and he confirmed that he was able to proceed but may require some breaks. I discussed with the Respondent the ill health of the witness Mr Day and it was confirmed by Mrs Sallons-Day that the Respondent was content to proceed.
4. The Respondent applied to add three documents to the bundle. The application was not opposed by the Claimant. The documents had already been added to the end of the electronic bundle I received.
5. The Claimant applied to have two documents added to the bundle. The Claimant had believed that if he wanted to add documents to the bundle after it was finalised this must be done at the hearing so had not brought this to the attention of the Respondent previously. These documents were an email chain ending on 25 March 2021 at 15:12 with an email from Shaun Tanner to Jody Sallons-Day and an email to the ET dated 27 October 2020 from Shaun Tanner. I noted that I had read the latter as it formed part of the tribunal file but I found the contents to be irrelevant to the these proceedings. Mrs Sallons-Day objected to the former email being admitted as it was inaccurate. Again, my view was that the contents of the chain were irrelevant to the decision to be made by the tribunal today and that neither document should form part of the bundle.
6. I clarified with the parties that I was in receipt of an agreed joint bundle of 293 pages which included the Respondent's extra documents. I also received four witness statements. The witness statements were those of the Claimant, Gregor Hosie (witness for the Claimant), Tony Day and Jody Sallons-Day (witnesses for the Respondent). All the witnesses attended the hearing and gave evidence.

Findings of Fact

7. The Respondent is an architecture and planning company which has two directors, Anthony (Tony) Day and Shaun Tanner. The Claimant commenced employment with the Respondent on 1 September 2015 as an architect.
8. On 12 April 2019 a shareholders' meeting took place at which the Claimant's future with the company was discussed and concerns about his behaviour in the office were raised by Shaun Tanner, Tony Day and Jody Sallons-Day, a shareholder of the Respondent and wife of Tony Day.
9. The Claimant was not present at that meeting and neither before nor after the meeting, with the exception of the dismissal on 29 May 2019, was any disciplinary action taken against the Claimant.

10. On 15 April Jody Sallons-Day approached the Claimant at his desk and asked for a list of the Respondent's IT passwords. There was a dispute between the parties as to whether Mrs Sallons-Day approached the Claimant shouting at him about the passwords. Having heard evidence from the Claimant, Mrs Sallons-Day and Mr Hosie I find that Mrs Sallons-Day did shout at the Claimant that day. Mr Hosie's statement and oral evidence corroborate the description of events in the office put forward by the Claimant. During the conversation the Claimant informed the Mrs Sallons-Day that he was unwell and suffering from high blood pressure. Following the exchange, the Claimant left the building and finding his exit by car blocked by Mrs Sallons-Day's car he left the car park on foot. The Claimant claims that Mrs Sallons-Day deliberately blocked his exit by car. Having considered the explanation put forward by Mrs Sallons-Day I accept that there was no deliberate attempt to block the Claimant's exit.
11. On or around 17 April 2019 the Claimant raised a grievance, in writing, to Shaun Tanner concerning the events that took place on 15 April 2019.
12. Tony Day responded to the grievance in writing on 17 April 2019.
13. On 29 May 2019 Mr Day spoke to the Claimant about Mr Day's discovery that the Claimant had set up a business (MD Cubed) and Mr Day's suspicions that the Respondent's resources were being used by the Claimant in the course of his own business. Mr Day told the Claimant that he was unhappy about this. The Claimant was reluctant to discuss the matter with Mr Day and asked Mr Day if he intended to sack him. The Claimant left to attend a meeting. Mr Day sent the Claimant a letter the same day dismissing him for gross misconduct. In the letter Mr Day said this was on the grounds of *'undertaking private work for clients that have approached Day Tanner in the first instance without the express permission of the directors...'* and Mr Day went on in the letter as follows: *'you are now a director of a company, MD cubed, which is working with two Day Tanner Ltd clients, which I believe is a direct conflict-of-interest. Although you claim to have informed one of the directors at Day Tanner your failure to inform me whether verbally or in writing, resulting in bypassing my authority as a director has rendered me with no choice but to take firm action.'*
14. On 30 May 2019 Mr Day advised the Respondent's payroll accountants that the Claimant was dismissed as of 29 May 2019.
15. On 30 May 2019, Shaun Tanner wrote to the Claimant stating that correct procedures for the termination of the claimant's employment had not been carried out and as a result, his employment was not terminated. He said that a meeting would be arranged between himself, Mr Day and the Claimant to discuss the situation. No such meeting took place. Mr Day was invited by Mr Tanner to meet with an HR advisor whom Mr Tanner knew but Mr Day did not attend any such meeting.
16. The Claimant chose to accept the letter from Mr Tanner retracting the dismissal and continued to work for the Respondent.

17. On 31 May 2019 Mr Tanner sent an all-staff email confirming the Claimant remained employed by the Respondent.
18. On 2 June 2019, the Claimant emailed Shaun Tanner, copying in Tony Day, acknowledging his letter and noting that whilst he would do his best to work he did not currently have access to the relevant systems, such as email and his Autodesk account. The Claimant did not return to the office until 10 June 2019.
19. On 10 June 2019 the Respondent's health insurance providers were instructed to remove the Claimant from the company policy with effect from 22 May 2019 and on discovering this on 18 June 2019 the Claimant subsequently sourced his own health insurance through the same provider. The Respondent denied that it had instructed that the Claimant be removed from the policy and relied on documents showing that on 29 May 2019 it had instructed that its health insurance provider be changed from Aviva to Axa with effect from 11 June 2021, and that the Claimant was included in the list of employees to be insured. The Respondent also states on the ET3 form that *'The Claimant incorrectly alleges that his Aviva health insurance was cancelled during his employment. It was cancelled on 11 June 2019 after he was dismissed for gross misconduct.'* I find on the evidence that the Respondent's insurers were instructed on 10 June 2019 to remove the Claimant from the policy with effect from 22 May 2019 and I find that although the broker was instructed on 29 May 2019 to include him on the new policy from 11 June 2019, no evidence has been provided to prove that he was so insured.
20. The Claimant was removed from the Respondent's payroll on 30 May 2019. The Claimant was instructed by Shaun Tanner to invoice Mr Tanner's company STL for payment for work carried out for the Respondent.
21. Mr Day, having made the decision to work from home after learning that the Claimant's employment had been re-instated by Mr Tanner, visited the Respondent's office on the weekend of 20-21 July 2019 to collect computer equipment for the purposes of working from home. He took equipment from the desk of a former staff member and from a desk which did not belong to a specific person. In addition, he took equipment, including the computer screens and keyboard, from the desk of the Claimant.
22. The Claimant was advised that equipment had been taken from his desk by a fellow employee, Gregor Hosie, in a telephone conversation. After visiting the office and confirming this the Claimant left the office and did not return.
23. The Claimant resigned the next day, on 23 July 2019, by way of an email to Shaun Tanner in which he said *'Tony has removed all of the old computers not in use, the screen and keyboard I was using along with a power supply for my personal laptop. Clearly this singled me out again as the only staff member who's items were removed. I could feel my blood pressure hit the roof and measured 160/110 at home. Once again I've been pushed past my limit and no longer wish to work in the office.'*

Submissions

24. Mrs Kellett, for the Claimant, said that Tony Day had accepted in cross examination that the Claimant had been dismissed by one director and then re-employed by another director. She said that from 15 May 2019 until 23 July 2019 whilst employed by the Respondent the Claimant was undergoing tests for high blood pressure and had received medical advice to minimise his stress. She said he had informed the Respondent of his condition. Following the Claimant's dismissal and reinstatement by the two directors if Mr Day had met with the Claimant as suggested by Mr Tanner, they could have discussed the Claimant's new business and the parameters that the Respondent wanted to put around that work in relation to his employment with the Respondent. She said that instead steps were taken to make life more difficult for the Claimant at work. His work computer was not returned, his access to email and software necessary for doing his job was not reinstated. In addition, he was removed from the payroll which affected his pension and national insurance contributions, and Aviva confirmed that it had been instructed to remove him from the Respondent's health insurance policy. The final straw came on 22 July 2019 when two large screens and the power cable were removed from his desk by Mr Day, where nothing was taken from the desks of other current members of staff. Mrs Kellett said at this point there was a complete breach of trust and the law. The Claimant had been advised that the partners were due to separate but he was not sure this would be a clean break. The effect of continuing in employment with the Respondent had such an effect on his health, he had to put his health before any financial decision.
25. Mrs Sallons-Day, for the Respondent, reminded the tribunal that the Respondent was a small company with limited administrative resources. She said that the company had been started by Tony Day 37 years ago and that he was a traditional man of integrity. In relation to the specific events relied upon by the Claimant as constituting a breach of contract, Mrs Sallons-Day said that Mr Day had responded to the grievance raised by the Claimant about the events of 15 April 2019 and had confirmed his intention of working together with the Claimant and the company harmoniously in the future. Mrs Sallons-Day said that the Claimant had denied the proof provided by the Respondent that the Claimant was on the list for renewal of the Respondent's health insurance policy. She said that the failure to reinstate PAYE was a non-issue as it had no bearing on payment. The Claimant could have been paid without being on PAYE. In relation to access to software and systems she said that the evidence in the bundle showed that the Claimant was largely responsible for IT in the company and had knowledge of how the backup systems worked. She said that after the Claimant was dismissed and reinstated Mr Day had removed himself from the building and never returned, so could not have had an effect on the Claimant. She said that the Respondent had at all times adhered to employment procedures and the Claimant had sought to make his claim personal against Mr Day. The behaviour of the Claimant before he was dismissed by Mr Day on 29 May 2019, and the subsequent re-instatement had led to a business being destroyed.

Law and Reasons

Dismissal 29 May 2021

26. Mr Day and Mr Tanner, as directors of the Respondent, both had the authority to employ and dismiss employees. Mr Day dismissed the Claimant on 29 May 2019, Mr Tanner re-instated him the following day. The Claimant accepted the reinstatement. No further dismissal action was taken against the Claimant by the Respondent. Mr Day admitted in oral evidence that Mr Tanner had the authority to reinstate the Claimant and that he was employed by the Respondent until he resigned on 23 July 2019. I find that the Claimant was reinstated so that the dismissal on 29 May 2019 was not effective, and the Claimant's employment continued until 23 July 2019 when the Claimant resigned his employment.
27. Having reached this conclusion there is no need to consider whether the dismissal of 29 May 2019 was unfair.

Dismissal 23 July 2019

28. The Claimant claims he was constructively dismissed on 23 July 2019 when he resigned. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that he was dismissed by the respondent under section 95.
29. Section 95 states: "For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2)...only if)-
 - a)-
 - b)-
 - 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 his employer's conduct"
30. This is what has become known as "constructive dismissal". The leading case of *Western Excavating (ECC) Ltd v Sharp 1978 ICR 221* makes it clear that the employer's conduct has to amount to a repudiatory breach. The employee must show a fundamental breach of contract that caused them to resign and that they did so without delay.
31. The Claimant relies on the Respondent's actions set out at paragraphs 2.7.1 and 2.7.2 above as constituting a fundamental breach of the implied term of trust and confidence between employer and employee. These actions include: the removal of the Claimant from the payroll and the failure to reinstate him when the dismissal was rescinded, the failure of the Respondent to meet with the Claimant after his re-instatement to discuss the dismissal of 29 May 2019, the instruction by the Respondent to its broker to remove the Claimant from the company health insurance policy on 10 June 2019, with effect from 22 May 2019, the failure to reinstate access to company

IT systems once the dismissal was rescinded and the removal of IT equipment from the Claimant's desk on 22 July 2019.

32. Mr Day said that access to IT systems could have been facilitated by Mr Tanner and it was not his job to sort out access. Mr Tanner is a director of the Respondent. The claim is against the Respondent and the Respondent did not reinstate access. Mr Day said that he could not have given the Claimant back his laptop as he (Mr Day) was using it, but he provided no alternative solution. It was suggested by the Respondent that even if not on the payroll the Claimant could have invoiced the Respondent, but in oral evidence Mr Day said that he did not know if he would have paid an invoice from the Claimant. Mr Day did not explain why he took equipment from the Claimant's desk on the weekend of 20 and 21 July 2019 and not from the desks of any other current members of staff.
33. Clearly there had been a breakdown in the relationship between the two partners of the Respondent company, and rather than the two meeting to resolve their problems they continued for a number of weeks with neither taking sufficient action to resolve the difficulties faced by the Claimant after his dismissal was rescinded. I find that the actions of the Respondent from 29 May 2019 to 23 July 2019 constitute a fundamental breach of contract, specifically a breach of the implied duty of trust and confidence.
34. I find that the Claimant did not delay in resigning and resigned in response to the breach, the discovery of the removal of equipment from his desk on 22 July 2019 being the final act of a course of conduct commencing on 29 May 2019. Whilst the Claimant has set out in his resignation letter that he had decided to become self-employed for a number of personal reasons he has also referred to the Respondent's conduct as a reason for resignation. Where there is more than one reason for a resignation, if the breach was a factor in the resignation, then that is sufficient (*Wright v North Ayrshire Council UKEATS/0017/13/BI*).
35. I find that the events of 15 April 2019 do not constitute a breach of the implied duty of trust and confidence. The events of that day took place separately to the conduct complained of above and although I accept that Mrs Sallons-Day shouted at the Claimant, I find that the Claimant also shouted at Mrs Sallons-Day and challenged her right to obtain company information in a hostile manner. I do not accept, having heard evidence of previous conversations between the Claimant and Mr Day, that this conversation with Mrs Sallons-Day was extraordinary and I do not accept that Mrs Sallons-Day deliberately blocked the Claimant's exit. Even had I found that this act could amount to a breach, the Claimant did not resign in response to the events of that day. He then raised a grievance and despite his discontent with the response received on 17 April 2019, affirmed the contract by continuing to work for the Respondent. The next act complained of took place on 29 May 2021 and did not concern the issue under discussion on 15 April 2019.
36. Having found that the Claimant's resignation on 23 July 2019 was a dismissal I must go on to consider whether the dismissal was fair. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within

section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

37. The Respondent said that the reason for dismissal on 29 May 2019 was one of misconduct, but no reason was given for dismissal on 23 July 2019. As the Respondent has not argued that there was a potentially fair reason for dismissal on 23 July 2019 the dismissal must be unfair, and I find that it was.

Remedy

38. The Claimant claims compensation by way of remedy. A decision on remedy will be made at a separate hearing.

Wrongful Dismissal

39. As I have found that the dismissal of 23 July 2019 was unfair, the Claimant is entitled to claim notice pay. As he had no written contract the award will be for statutory notice pay.

Holiday Pay

40. The Claimant claims that he is owed holiday pay of four days. The Respondent offered no evidence on this matter and I therefore find that the Claimant is entitled to compensation from the Respondent for four days holiday.

Employment Judge Anderson

Date: 19 July 2021

Sent to the parties on: 26/7/2021

N Gotecha.
For the Tribunal Office