



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Burton

**Respondent:** Navolio Ltd (trading as "Off to Work")

**Heard at:** Midlands West ET (by CVP)

**On:** 24-25 October 2024

**Before:** Employment Judge Routley

## Representation

Claimant: In person

Respondent: Anna Szwichtenberg (Respondent's Director of People)

# JUDGMENT

The Claimant was not constructively dismissed by the Respondent. The Claimant's claim does not succeed and is dismissed.

# REASONS

## 1. The hearing

- 1.1. The hearing took place by CVP on 24 and 25 October 2024. Neither party was legally represented.
- 1.2. The Tribunal was presented with a file of documents prepared by the Respondent. This has been compiled by the Respondent and sent to the Tribunal and the Claimant the day before the hearing. Mr Burton confirmed that he had had an opportunity to read the file and was ready to proceed.
- 1.3. Neither party had exchanged witness statements. The Claimant confirmed that the contents of his ET1 could be treated as his witness statement.
- 1.4. The file prepared by the Respondent had a written statement at the start. Ms Szwichtenberg was however very clear that this was not a witness statement, but a document prepared to aid the Respondent's case. I said that I would not be able to take this into account as evidence as it was neither a contemporaneous document nor something to which the Respondent's witnesses would be attesting under oath. The Respondent would have an opportunity to make submissions at the end of the case.
- 1.5. Ms Szwichtenberg confirmed that the contents of paragraph 6.1 of the ET3

could be treated as her witness statement.

- 1.6. I began the hearing by clarifying the issues in the case. The Claimant confirmed that his claim was one of constructive dismissal, and that he relied upon the following alleged breaches of his contract of employment:
  - 1.6.1. A breach of a specific term that the Claimant would be allowed to work flexibly for a period every year to facilitate his filming schedule. The Claimant's case was that this was not a written term of his employment contract but a verbal agreement made between the Claimant and his original line manager, Katie Pearce; and
  - 1.6.2. A breach of the implied term of trust and confidence, in that the Respondent had unreasonably failed to allow him to work flexibly to facilitate his filming schedule.
- 1.7. The Respondent intended to rely on emails as evidence to support its defence. I explained to the Respondent that the Tribunal would only be able to place limited weight of these emails in circumstances where there was no witness able to swear to the truth of them, or to answer questions from Mr Burton.
- 1.8. The Respondent had also made handwritten comments on various documents within the file. I explained that I would have to disregard these comments and that these issues should be covered in the Respondent's evidence as appropriate.
- 1.9. Following clarification of the issues, and the Tribunal process, Ms Szwichtenberg confirmed that the Respondent would need Katie Pearce to attend and give evidence regarding the historical arrangements made to accommodate the Claimant's filming schedule.
- 1.10. I therefore agreed that Ms Pearce could attend to give evidence, provided that she was able to provide a copy of her witness statement to the Tribunal before 2pm on the first day of the hearing.
- 1.11. I considered whether it would be appropriate to allow Ms Pearce's evidence to be submitted at this late stage. However, I felt that it would be in accordance with the overriding objective to allow Ms Pearce to give evidence. I took into account the fact that neither party was legally represented, and that neither appeared to have fully understood the steps required to prepare for a Tribunal hearing. Additionally, I considered the fact that the issues in the case had not been fully particularised until the morning of the first hearing.
- 1.12. Ms Pearce's evidence was clearly key to the Respondent's case and they would be placed at a significant disadvantage without it. The Claimant would be placed at some disadvantage because he was receiving the witness evidence at a late stage. However, Ms Pearce's evidence was not lengthy. The hearing was adjourned at 2.30pm on the first day in order to give the Claimant an opportunity to consider the statement.
- 1.13. Ms Pearce gave evidence at the start of the second day. Prior to her evidence, I asked Mr Burton whether he had had sufficient time to review her witness statement and Mr Burton confirmed that he had. I gave Mr Burton the option of an adjournment of a few hours but he confirmed he was happy to proceed.
- 1.14. A further case management issue was raised during the course of the hearing.

Mr Burton's ET1 stated that he had made a recording of a meeting which took place between him and the Respondent on 18 April 2024. The Respondent requested disclosure of this recording. Mr Burton confirmed that the recording no longer existed. It was not therefore possible for me to make any order for disclosure.

- 1.15. In addition, it became clear from the documentation that although the claim had been brought against "Off to Work", and that a response had been submitted using this name, this was in fact a trading name of the Respondent. The correct name for the Respondent was in fact Navolio Ltd. I made an order that the name of the Respondent be changed to Navolio Ltd.

## **2. Findings of fact**

- 2.1. It was an agreed fact that there was no written term of the Claimant's contract entitling him to time off to facilitate his filming schedule.
- 2.2. I made the following findings of fact:
  - 2.2.1. The Claimant was employed as Head of Culinary Operations from 1 August 2016 until 29 April 2024, when the Claimant resigned with immediate effect.
  - 2.2.2. In addition to his role with the Respondent, the Claimant had a recurring role in the "Father Brown" TV series.
  - 2.2.3. Prior to 2024, the Claimant had been allowed to work flexibly for a period of the year to accommodate his filming schedule. The precise nature of this arrangement had varied, and had involved a combination of the Claimant using his scheduled days off, taking annual leave and using time off in lieu.
  - 2.2.4. The Claimant provided remote telephone support to the Respondent whilst filming.
  - 2.2.5. In 2023, the Claimant had sent an email setting out his request for a flexible working pattern. The Claimant set out a proposed working pattern, but caveated this with the words "if you are in agreement".
  - 2.2.6. In March 2024, the Claimant sent a very similar email with a proposed working pattern. The Claimant said that he "would like" to use a similar arrangement to previous years.
  - 2.2.7. It was common ground between the parties that there had been a downturn in business in the period leading up to this request. The Claimant accepted in evidence that the business "wasn't doing as well as it had been".
  - 2.2.8. It was also common ground that another culinary expert from within the business, Lesley, had been sent to work in Paris. There was a dispute as to when the Claimant was informed that this would happen, but it was agreed that Lesley was in Paris in Spring 2024.
  - 2.2.9. The email requested a period of flexible working from 8 April 2024 to 2 August 2024. The Claimant proposed that he meet the requirements of his filming contract by a combination of: using scheduled days off; working weekends and using the time accrued in lieu; using annual leave; and/or taking unpaid leave.

- 2.2.10. The Claimant was unable to provide precise details of the filming timetable at the time of this email, but said he would “do my utmost” to avoid clashes with the Respondent’s events.
- 2.2.11. On 5 April 2024 the Claimant sent a further email setting out the working pattern he intended to follow for the first block of filming.
- 2.2.12. On 11 April 2024, Max Hayward (the Respondent’s Midlands Branch Manager) sent an email to Ms Szwichtenberg explaining why he felt that the Respondent would be unable to support the Claimant’s filming schedule that year.
- 2.2.13. On 18 April 2024, Max Hayward and Ms Szwichtenberg met with the Claimant in order to explain the reasoning behind the Respondent’s decision that they would not be able to support the Claimant’s filming schedule that year.
- 2.2.14. The decision was made jointly by Max Hayward and Ms Szwichtenberg. The Claimant indicated that he had assumed that the decision was made by Max Hayward as branch manager, but Ms Szwichtenberg gave evidence that she was involved in the process.
- 2.2.15. The Claimant’s request was refused for business reasons, including the fact that a) there had been a downturn in sales and so the Respondent was unable to recruit casual staff to support with the Claimant’s absence; b) the Claimant’s assistant had been sent to work in Paris; and c) Katie Pearce, a senior member of staff was away on adoption leave.
- 2.2.16. On 29 April 2024, the Claimant resigned with immediate effect.

### **3. Relevant law and judgment**

- 3.1. It was common ground between the parties that the Claimant had not been explicitly dismissed. The Claimant had resigned. However, the Claimant’s case was that the Respondent’s actions amounted to a repudiatory breach of contract, resulting in his resignation.
- 3.2. The Claimant’s case is based on two alleged breaches of his contract. I have considered each of these in detail below.
  - 3.2.1. **A breach of a specific term that the Claimant would be allowed to work flexibly each year in order to accommodate his filming schedule**
    - 3.2.1.1. It was common ground between the parties that there was no written clause in the Claimant’s contract of employment stating that he had an ongoing entitlement to work flexibly.
    - 3.2.1.2. The Claimant claims however that there was a verbal agreement between him and Katie Pearce that he would be allowed to work flexibly for a period each year.
    - 3.2.1.3. I find that there was no specific contractual agreement that the Claimant would be allowed a period of flexible working each year.
    - 3.2.1.4. Katie Pearce gave evidence that the Claimant had been allowed to work flexibly during each year of his employment prior to 2024. However, Ms Pearce’s evidence was that this was something that

the Respondent considered on a year-by-year basis, and not something that was guaranteed indefinitely.

3.2.1.5. The Claimant's case was that there was an ongoing contractual arrangement that he would be allowed to work flexibly. However, the language used by the Claimant in the relevant email correspondence reinforced Ms Pearce's interpretation. The Claimant suggested an approach to flexible working, caveated with the words "if you are in agreement", and also said that he "would like" a particular working arrangement. This indicates that the Claimant's correspondence was a request for permission, rather than an indication that he intended to utilise an existing clause of his contract.

3.2.1.6. Further, during his questioning of Ms Pearce, the Claimant indicated that his working arrangements had been "signed off" each year. Again, this indicates that the flexible working arrangement had to be agreed by the Respondent, not that it was the subject of a pre-existing contractual arrangement.

3.2.1.7. In addition, for a contractual promise to be binding it has to be sufficiently certain. An agreement that an employee will be allowed to work "flexibly" is not sufficiently certain to amount to a binding contractual term, in circumstances where fundamental details are undetermined (such as the period of time during which flexible working would be required, the dates on which the Claimant would be available to work and the hours or days during which the Claimant would be absent).

3.2.1.8. In circumstances of such uncertainty, the Claimant would be able to demonstrate, at best, an agreement to agree. Such an agreement will not be legally binding [*Barbudev v Eurocom Cable Management Bulgaria EOOD* [2012] EWCA Civ 548]

3.2.1.9. For these reasons I find that there was no breach of a specific term of the Claimant's employment contract.

### **3.2.2. A breach of the implied duty of trust and confidence**

3.2.2.1. It is an established principle of law that an employer must not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer or employee [*Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666].

3.2.2.2. It is not necessary to show that the employer intended any repudiation of the contract [*Varma v North Cheshire Hospitals NHS Trust* [2007] UKEAT]. The question to be determined is whether, judged objectively, the employer's conduct as a whole is likely to cause serious damage to the employer/employee relationship.

3.2.2.3. The Claimant had made a wide-ranging request for flexible working, extending over a period of four months. The Claimant admitted himself that his filming schedule may result in clashes with events catered by the Respondent, such as the Silverstone Grand Prix.

- 3.2.2.4. The Respondent had accommodated similar requests in previous years. However, the Respondent explained that the situation had changed, with a downturn in business and a reduction in staff numbers. The Respondent demonstrated clear business reasons for its decision.
- 3.2.2.5. The Respondent considered the Claimant's request appropriately, holding a meeting with the Claimant to discuss its decision and providing a full justification in writing.
- 3.2.2.6. I therefore find that the Respondent's behaviour in this case, judged objectively, was not such as to destroy or seriously damage the relationship of trust and confidence between employer and employee.
- 3.2.2.7. Had the Claimant been able to demonstrate that the Respondent had conducted itself in a manner calculated or likely to destroy or seriously damage the relationship between employer and employee, the Claimant would additionally have to have shown that the Respondent's behaviour was "without proper cause."
- 3.2.2.8. The Claimant's case was that the Respondent's branch manager, Max Hayward, had refused his request because he was "making a statement." This would amount to behaviour "without proper cause." However, the Claimant was unable to provide evidence that the decision had been made solely by Max Hayward, or that Mr Hayward had any vindictive motive for any such decision. The Claimant said himself during the course of the hearing that he had merely "assumed" that it was Max Hayward's decision.
- 3.2.2.9. In evidence, the Respondent set out clear business reasons why it was unable to grant the Respondent's request. These reasons included: a) a downturn in business meaning that it was unable to use casual staff to provide cover for the Claimant's period of absence; and b) the fact that another member of staff with a similar area of expertise to the Claimant had been sent to work in Paris; and c) the fact that a senior member of the team was away on adoption leave.
- 3.2.2.10. I therefore find that the Respondent had proper cause to take the action it did, in that it needed the Claimant's presence in the business and so was unable to accommodate his request for flexible working.
- 3.2.2.11. I therefore find that there was no breach of the implied term of trust and confidence. The Claimant's claim does not succeed.

Employment Judge **Routley**

Date 14 November 2024

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