

EMPLOYMENT TRIBUNALS

Claimant: Mr R Pedro

Respondent: 1stavenue.co.uk Ltd

Heard at: London South

On: Wednesday, 27 September 2017

Before: Regional Employment Judge Hildebrand

Representation

Claimant: In Person

Respondent: Mr J Lodwick, Counsel

RESERVED JUDGMENT

The Claimant's claim alleging breach of contract fails and it is therefore dismissed.

REASONS

The Claim

1. By a claim submitted to the Tribunal on 6 August 2017 the Claimant claimed that the Respondent should have paid him a full month of notice and had only paid one week. He sought the remainder of his month's notice as per contract which he said amounted to £2,243.60.
2. The claim was resisted by the Respondent on the grounds that the Claimant was given verbal notice to terminate his contract on 13 April 2017. On the same day a letter was typed and posted by first class post confirming the dismissal. On 18 April 2017 the Respondent received an e-mail from the Claimant purporting to give notice of termination of

- employment and giving one month's notice. The Respondent contended that the notice given by the Claimant was null and void in light of the Respondent's correspondence. Further, it was said that all monies due to the Claimant had been paid into his bank account.
3. Before dealing with the merits it was possible to resolve issues regarding the quantum of the claim during the course of the closing submissions. The Respondent contended, and there is no basis for dispute, that the Claimant was paid his full salary for April 2017 in the net sum of £3,187.05 paid into his account on 28 April 2017 the last working day of the month.
 4. In his submission Counsel for the Respondent computed that, if the Claimant was successful, his claim was limited to 19 days pay on the basis that this represented one month from the Claimant's notice on 18 April. As a portion from the Claimant's net salary in March of £2,222.18 this equated to £1,361.98.

The Issues

5. The issues in this case are as follows:-
 - 1) Whether, on the Respondent's case, having been dismissed already on 13 April the Claimant's contract was still in existence when he himself purported to terminate it on 18 April 2017 and
 - 2) If the contract was still extant whether the Respondent's Director, Tanya Bonney in fact posted a letter of termination of employment dated 13 April 2017 as the Director claimed she did.

The Evidence

6. I heard evidence from the Claimant and on the Respondent's behalf from Mrs Tanya Bonney, Finance Director.

The Findings of Fact

7. The Claimant's employment begun with the Respondent on 16 January 2017. A contract of employment was signed by the Claimant on 13 January by the Respondent's Director, Mr Endacott on 17 January 2017.
8. Clause 17 of the contract on page 28 of the bundle deals with "Ending the Employment". At 17.1 it states that the first three months of the employment shall be treated as a trial period during which time either party may terminate the employment by serving not less than one week's written notice. Clause 17.2 provides that after the trial period has expired the employee is entitled to terminate the contract by giving one month's written notice. Clause 17.3 provided that after the trial period

has expired the employer is entitled to terminate the contract by giving the employee the statutory minimum written notice. The Claimant's entitlement to statutory minimum notice was thus limited to a period of one week until he had completed two years service. Clause 17.4 allowed the employer to make a payment in lieu of notice or require the employee to remain away from work during the notice period.

9. Clause 17.5 provides that the employer might at any time with immediate effect terminate the contract of employment in the event of gross misconduct or other serious breaches.
10. Clause 18 provides that notices by the employee must be in writing addressed to the employer at the employee's main place of business. Notice by the employer must be in writing addressed to the employee at his last known address in Great Britain. Finally, clause 18.2 provided:-

“Any notice given by letter will be treated as being given at the time at which the letter would be delivered in the ordinary course of first class post. Any notice delivered by hand will be treated as being given upon delivery. In providing service by post it will be enough to prove that the notice was properly addressed and posted.”

11. 13 April 2017 was Maundy Thursday. It is clear that there was a dispute in the office of the Respondent on this day. The Claimant was alleged by others to have been shouting across the office and had an argument, described as an altercation, with another member of staff. A Director, Mr Endacott, investigated the matter and concluded that the Claimant's behaviour was unacceptable. The Respondent immediately decided they did not wish to retain the Claimant beyond his probationary period. The Claimant was away from the office on business around lunchtime and returned in the early afternoon. Mr Endacott orally dismissed the Claimant and told him he would receive payment in lieu of notice and that his dismissal was with immediate effect. The Claimant produced a written statement for the Tribunal hearing. Curiously it makes no mention of the events of the 13 April 2017. When I asked the Claimant to supplement his evidence in chief before cross-examination the Claimant gave evidence to me:-

“I accept I was verbally dismissed on 13 April and I was told not to touch the computer. This was in the afternoon about 2.30 or 3.30. I had volunteered to deliver some keys in Woolwich. When I came back I was told to go. I was told never to come back.”

In the response to cross-examination the Claimant was asked:-

“When Mr Endacott spoke to you were you told that you had been dismissed on 13 April verbally?”

The Claimant answered:-

“Yes, it was clear that was my last day and I was told to go home. I did not argue that I was not told to go, but I do not accept that the Respondent followed the contract to the letter.”

The Claimant described that Mr Endacott had told him not to touch any property of the Respondent when he tried to delete some personal information and details of his search history from his office computer. He was asked if he accepted the employment was at an end. He said he went home and read the contract and saw this had to be done in writing so he sent a letter and posted it. In a further answer he said he felt he had been dismissed verbally and had nothing in writing. He asked if had to go to work after 13 April. He was told he did not have to go to work on 15 April. This was a normal working day, the Saturday of the Easter weekend.

12. After the Claimant had left the Respondent's premises on Thursday, 13 April Mr Endacott contacted Mrs Bonney. From her oral testimony Mrs Bonney sought advice at every instance from those advising her. She typed a letter on 13 April which she posted 1st class shortly after 6pm on Thursday, 13 April. The letter says:-

“As per the conversation with Paul Endacott today, it is with regret that we feel we need to terminate your employment. As you are still within your trial period, this is one weeks' notice which we are prepared to pay in lieu of notice, as such you will not be required to attend work from this point forwards.”

The letter then wished the Claimant well.

13. That letter was not received by the Claimant, and there is no reason to dispute this, until Wednesday, 19 April 2017. The Claimant's evidence was that he expected written confirmation and received none on the working day after the weekend, Tuesday 18 April, and in light of that fact and because he contended that his trial period had been completed sent notice by e-mail to the Respondent resigning his role and giving one month's notice. It is for the balance of that month that the Claimant claims.
14. From those various conflicting pieces of evidence my conclusion is that in terms of construction clause 17 of the contract allows the employer or employee to terminate the contract by giving written notice. Clause 18 specifies the way in which written notice is to be given. I do not find that the contract indicated that oral notice could not be given and I find the clause 17.5 envisages termination with immediate effect in cases of gross misconduct.

Submissions: The Respondent

15. The Respondent produced a skeleton argument. This was supplemented by oral submissions. The primary submission is that the Claimant was dismissed orally on 13 April 2017. The Claimant accepted the Respondent's repudiation of the contract. It was clear to the Claimant that he had been dismissed and his employment had come to an end. He had not attended work on 15 or 18 April or protested his dismissal. His purported notice of termination was after the contract had already come to an end.
16. The secondary submission was that, when Ms Bonney gave notice of termination, the notice was given when the letter would ordinarily have been delivered by 1st class post and so the letter would have been delivered on 15 April 2017 which was the Saturday of Easter weekend, or, if the letter was posted after the last post, on the morning of Tuesday, 18 April. The Claimant gave notice on 18 April by post which was delivered on 19 April therefore after the Respondent had already given notice. Assuming the Respondent's notice was effective on 18 April it would have expired on 25 April. The Claimant was paid salary for the whole of April as well as accrued holiday and commission and no further sums owed.
17. The third issue referred to by the Respondent orally was whether the Respondent could "trump" the Claimant's notice even if the Claimant had given notice before them. It was said that must be a matter of construction. There must be occasions when an employer could not trump the Claimant's notice if this was just done to defeat notice given by the Claimant. In this case there was a disciplinary incident. The Respondent had brought, or tried to bring, the contract to an end. The Respondent was entitled to trump the Claimant's notice because of this serious incident. By a way of example if there was misconduct in the second week of a month's notice given by the Claimant the employer would be entitled to dismiss by notice during that week.

Submissions: The Claimant

18. The Claimant's submission focused on the challenge by the Respondent to his professionalism, particularly with regard to the events which led to the termination of his employment. He did not agree with some of the witness statements in the bundle and he then began to make reference to the reason for the dispute in the office and his background career. The Claimant pointed to the fact that the Respondent had relied on two different dates for termination, 20th and 25th April. The Claimant had waited 48 hours for a letter to be delivered and none was received. He was told not to present himself to work. He did not take a holiday. He took his work seriously.

The Law

19. Following the decision of the Supreme Court in **Geys v Société Générale, London Branch, 2013 ICR 117 SC** the law is clear that an unaccepted repudiation does not terminate the contract, in accordance with the majority view. The decision informs the outcome in this case by requiring that the Claimant either expressly or by his actions affirms the breach.

Conclusion

20. I accept as primary facts in this case that the Claimant was dismissed orally on 13 April 2017. He was told not to return to work and it was made clear to him by Mr Endacott that his employment was at an end. The Claimant did not seek to attend for work notwithstanding that indication. He accepted the employment had been brought to an end. He did not protest his dismissal. The e-mail he sent on 18 April fails, as did the Claimant's witness statement, to confront in any way the fact that Mr Endacott had terminated his employment on 13 April and told him not to return. His e-mail of 18 April attempts to introduce into a situation which is factually clear some doubt based on a speculative approach to the contract of employment.
21. The Respondent's submission is that the Claimant was dismissed and he accepted that dismissal. Although the contract provides ways in which dismissal can be effected I do not accept that those are to the exclusion of all other possible methods. Just as an employment contract can be concluded orally it can, as this contract indeed envisages, be terminated orally. In the event that it was not permissible under the contract for the Respondent to terminate orally that in itself, as Mr Lodwick identifies, amounts to a breach of contract on the part of the employer. The Claimant accepted the breach when he left the Respondent's employment and failed to attend for work thereafter. He recognised the validity of the instruction given to him by his action in not attending on the following working day Saturday, 15 April.
22. If I am incorrect in that conclusion, I find that the Respondent served notice in writing which it is common ground was received on 19 April 2017. The Respondent was entitled to bring the contract to an end by that notice and pay the Claimant to the end of April. That is beyond seven days from the Claimant's receipt of the Respondent's notice.
23. I consider it unsustainable as an argument on the Claimant's part that he was able by his notice to the Respondent to prevent the Respondent bringing the employment to an end in accordance with a contractual provision which had already been set in train by the respondent in the letter of 13 April. A further notice was issued on 19 April and the Claimant was paid beyond 7 days from the date of that notice.

24. I therefore conclude that the Claimant's claim for one month's notice in circumstances where he had been dismissed by the employer on one week's notice failed and it is therefore dismissed.

Regional Employment Judge Hildebrand

Date 16 October 2017