



# EMPLOYMENT TRIBUNALS

## BETWEEN

Neil Beresford

Claimant

and

J & J Denholm Ltd

Respondent

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD AT** Exeter

**ON**

01 August 2018

**EMPLOYMENT JUDGE** P S L Housego

### Representation

**For the Claimant:** In person

**For the Respondent:** Ms C Grayden, solicitor

### JUDGMENT

**The judgment of the Tribunal is that the claim is dismissed.**

### REASONS

#### Summary

1. In this case the Claimant resigned, and claims that he was constructively dismissed. The breach of contract asserted by the Claimant is that the Respondent rearranged his tax affairs so that the accommodation which he occupied for work and for which they paid became a taxable benefit in kind (on form P11D).

2. The Respondent says that this was what it had to do, and income tax always falls on the employee.

### Issues

3. These are:
  - 3.1. Was there a breach of a contractual term, such as to justify the Claimant resigning without notice? If no, the claim fails. If yes,
  - 3.2. Did the claimant resign by reason of it? If no, the claim fails, if yes,
  - 3.3. Did he do so in good time? If no the claim fails, if yes,
  - 3.4. Did he affirm the contract in the meantime? If no the claim succeeds, if yes it does not.

### Evidence

4. I have heard oral evidence from the claimant, and for the respondent I have heard from Ailsa McCormack who is Group Tax Manager of the Respondent.
5. I have considered an agreed bundle of documents of 113 pages, which was paginated and indexed.

### Submissions

6. The Claimant said that he used to stay in guest houses and claim the cost back as expenses. The contract was silent as to accommodation but it was always to be that they would pay it, and he would not pay tax on the cost. If he had known that it would be taxable he would have asked for more money and sorted it himself. The tax meant that the amount of money he was left with meant his job was worth much less and the new job was better. While it was 3 miles from home, he had travelled the world to work, and that wasn't the reason for the change. They had always paid his accommodation, and he had never paid tax on it. There was nothing in the contract to say that he should be taxed on it. The delay in giving him the grievance outcome was indicative of how little they regarded him, but was not itself a breach of contract. The new MD was always on to him, and should not have been as he had a line manager. He thought it was all a device to get him to resign.

7. The Respondent's case is simply that it was applying the tax rules, and there is nothing contractual, express or implied, that could lead to a finding that there was a right to tax free accommodation, and that would be a very unusual step for any employer to take.

#### Facts found

8. The Claimant was a senior operations manager for the Respondent. The Respondent provides support services to companies undertaking construction and maintenance work throughout the UK.
9. The Claimant started work with the Respondent on 27 October 2014 on a salary of £55,000 a year as Southern General Manager (Scaffold). His job offer letter dated 26 September 2014 [41] stated that he was based in Plymouth. He lives in Swansea. The letter states that he was to have a company van, but does not mention accommodation.
10. The contract of employment [43-52] does not refer to accommodation.
11. By a new contract of employment effective from 01 February 2016 [53-62] the claimant was promoted to Senior Operations Manager and his salary was £58,500 a year. The same contract form was used with these changes.
12. The Respondent had treated the Claimant as a peripatetic worker and so had paid his accommodation expenses without deduction of tax, disclosing all expenses to HMRC, and arriving at a company wide settlement for such expenses.
13. There were a small number of examples of the Claimant being in shared accommodation. Because of the difficulty of dividing the expense HMRC do not levy tax on it. After a 2 year period HMRC regard expenses as at the principal place of business whatever the contract says. The expenses were all in the Plymouth area, and 2 years had passed: HMRC would not permit further accommodation to be free of tax given the length of time the Claimant had been provided with accommodation in Plymouth at the Respondent's expense.
14. The Respondent provided accommodation for the Claimant in Plymouth in 2016/2017. The cost was £6927 for that year. The Claimant had found a place he liked and for the most part he stayed at the same place.
15. For the year 2016/2017 the Respondent added this expense to a form P11D submitted to HMRC, under the heading "Living Accommodation". The Claimant objected to this and met the Respondent's managers in March and in May 2017 to object to this. The Claimant said that he had a

- contractual right to tax free accommodation. The Respondent said there was nothing they could do, as that was what the law required.
16. On 12 June 2017 the Claimant wrote on this form that he objected, and that it was a breach of contract. He asked that it be withdrawn or he would raise a grievance.
  17. On 18 June 2017 the Claimant raised a grievance [67-68]. He wrote that in his terms and conditions was no provision to permit the accommodation to be subject to benefit in kind tax liability.
  18. On 21 June 2017 there was a meeting about the grievance. The Claimant said there was no consolation about this. It was effectively retrospective. It amounted to a bill of about £7,000 for him. There was nothing express or implied in his contract that he would be liable.
  19. By an undated letter which the Respondent says was sent to the Claimant on 25 July 2017 (and which he said he received when returning home on 27 July 2017) the grievance was not upheld. The decision was that the Respondent was providing a taxable benefit in kind, and that was taxable, and that liability fell on the Claimant, as with all income taxation. It was not accepted that there was a contractual right to tax free accommodation. The Respondent had no option but to fill in tax forms correctly, which it had done, and was not under an obligation to pay the tax that resulted for the Claimant from so doing.
  20. The Claimant resigned on 28 July 2017, leaving with immediate effect, without giving any notice. He said it was because of his grievance being rejected and taking 4 weeks to do so. He commenced a new job on 01 August 2017. He had arranged the new job the Saturday he got the grievance outcome, speaking to a person locally he had known for 35 years, and who arranged the job on Monday, to start Tuesday. It was at £63,000 a year, but his old job was £58,500 plus 12.5% pension contribution, and now he gets the statutory minimum.
  21. The accommodation cost was in Plymouth, and the Claimant's place of work was Plymouth. While accommodation away from the principal place of work is not a benefit in kind, it is a benefit in kind to provide accommodation at the principal place of business.
  22. There is no evidence to support the bald assertion that this was a device to get the Claimant to resign, an assertion that is not detailed by the Claimant, and while it is in the statement of claim, it is not in his witness statement at all, and was raised only after cross examination when I checked with the Claimant that he had said all he wished about facts. I find it not to be so. In any event, the application of the P11D rules to

accommodation was not a breach of contract, and was an HMRC requirement. Even if the MD was pleased at the outcome (and I make no such finding of fact) it is irrelevant.

### Decision

23. Even if the Claimant was not taxed on the accommodation before 2016/2017 that does not mean that there was any right to tax free accommodation. It means only that he was not taxed on it in former years.
24. There is no evidence to show such a right. Either the accommodation should not have been tax free before, or the tax rules were tightened up, or the situation changed. Whichever it is, the tax from 2016/2017 is due, as the Claimant agrees, and falls on the Claimant, as does all income tax.
25. There is no evidence that any representation was made that accommodation would be provided free of tax. Even if the Claimant was given that expectation, that does not confer a contractual right. I do not doubt that the Claimant expected the accommodation to be tax free, as it had been at first, and that the Respondent led him to that expectation. That does not elevate this to a contractual right: it was a mistake in the application of tax law by whoever led the Claimant to that expectation. The most that could ever have been said to the Claimant (whose evidence about this was vague) is that there would be accommodation paid, and that it was not going to be treated as a taxable benefit in kind. That it subsequently was treated as a taxable benefit in kind does not mean there was a breach of contract, any more than if the Claimant had been told that his tax was to be deducted at 35% and then the rate went up to 40% with an increased tax burden.
26. Accordingly there is no breach of contract by the Respondent, which was obliged to apply the benefit in kind income tax rules, and to fill in a P11D for the Claimant honestly.
27. It was not a fundamental breach of contract for the Respondent not to give the outcome letter for 4 weeks, and the Claimant does not assert that it was.
28. As there was no breach of contract, there was a resignation, and not a dismissal, and therefore the claim is dismissed.
29. For completeness, the tax on the benefit in kind and reduction in net income was the reason for the Claimant leaving, and he resigned immediately on receipt of the grievance outcome, which was promptly. He meets the subsequent limbs of the test for constructive dismissal, but not

the first, and critical, test of a breach of a fundamental term of the contract by the Respondent.

---

Employment Judge P S L Housego

Dated 01 August 2018