Case: 1806042/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mr C Bray**
Respondent: **Purple Frog Text Limited**

AT A HEARING

Heard at: **Hull** **On: 8th February 2019**
Before: **Employment Judge Lancaster**

Representation
Claimant: In person
Respondent: Mrs T Saeedi, director

JUDGMENT

1. The Claimant was dismissed by reason of redundancy and the Respondent is ordered to pay him a redundancy payment tin the sum of £978.00

2. The Claimant was unfairly dismissed and the Respondent is ordered to pay him compensation as follows:

   2.1 4 weeks' net loss of earnings £1807.04
   2.2 Loss of statutory employment rights £450.00

3. The Claimant was wrongfully dismissed without proper notice and the Respondent is ordered to pay him damages for breach of contract in the net sum equivalent to 2 weeks' wages, £903.52

4. The Respondent has made an unauthorised deduction from the Claimant's wages due for March 2018 and is ordered to pay him compensation in the gross sum of £1300.00

5. The Respondent has made an unauthorised deduction from the Claimant's wages in respect of unpaid commission, alternatively it is in breach of contract not to have paid the outstanding amounts due upon termination, and is ordered to pay him compensation in the gross sum of £2853.50

6. The Respondent has failed to pay the Claimant in respect of 3 ½ days holiday accrued and untaken at the date of termination and is ordered to pay him compensation in the gross sum of £403.83

7. The Employment Protection (Recoupment of Jobseeker's Allowance & Income Support) Regulations apply to the unfair dismissal award as follows:
    a. monetary award £2257.04
    b. prescribed element £1807.04
    c. period of prescribed element 15th April to 13th May 2018
    d. excess of monetary award over prescribed element £450.00

WRITTEN REASONS

1. The Claimant was employed by the Respondent as its sales manager from 1st September 2015 until his dismissal by email on 19th March 2018. He was given 2 weeks' notice and the effective date of termination was 1st April, with his last working day being 31st March 2018.

Redundancy

2. The Claimant claims, amongst other things, that he was entitled to a redundancy payment. Therefore under section 163 (2) of the Employment Rights Act 1996 there is a presumption that he has been dismissed by reason of redundancy unless the contrary is proved.

3. Although the Respondent has asserted that the reason for dismissal was "some other substantial reason" it has not proved that this was the reason so as to rebut the presumption.

4. The Respondent's pleaded case is that the dismissal was "following his refusal to accept a change in his terms and conditions of employment". In actual fact the proposed change to a 2 day week upon a 3 month fixed term contract was only contained within the email of 19th March. The Claimant had not refused that change prior to his being dismissed.

5. I any event I am satisfied that the reason for dismissal was that the Respondent could no longer afford to employ a full time sales manager, but could only offer 2 days work per week.

6. That is a redundancy within the definition of section 139 of the Employment Rights Act 1996. The requirements of the business for an employee to carry out work of a particular kind had diminished. That diminution in requirement can be temporary or permanent and for whatever reason: section 139 (6)

7. The Claimant is therefore entitled to a statutory redundancy payment calculated on the basis of 2 year's continuous employment, that is 2 weeks' gross pay capped at £489.00 per week.

8. There is no reason not to make that award. Neither the offer of a fixed-term contract nor the subsequent offer, immediately before the expiry of the notice of fresh permanent employment (but expressed to be without preserved continuity of service) on similar terms to the fixed-term contract are suitable alternative employment within the meaning of section 138 of the Employment Rights Act 1996. The Claimant was

perfectly reasonably entitled to refuse those offers, the terms of which differed substantially from those of his original contract and were hugely disadvantageous to him. Although the remuneration was not specified it is clear in context that the Respondent was proposing a pro-rata reduction in salary from £30,00.00 gross per annum to £12,000.00. The offer of a share in the business is a separate matter, has no immediately quantifiable value and is not income; so it is not relevant to considering the suitability of the employment. In the course of discussions about the Respondent's financial predicament the Claimant had already indicated that the absolute minimum net pay he could accept, even on a short term basis, was £1,000.00 per month.

9. Nor is there any reason to reduce the award because of the Respondent's allegation that the Claimant's conduct after being given notice of dismissal amounted to gross misconduct for which he might have been summarily dismissed.

10. Although the Claimant's conduct in sending work emails to his personal email address is a breach of clause 10.2 of the (unsigned) written contract of employment the Respondent has no evidence that he used this information at all, except in so far as the emails concerned the circumstances of his own contract and dismissal. It is also not disputed that on or about 15th April the Claimant consented to the Respondent remotely accessing his computer to delete these emails.

11. In these circumstances, although I do not in fact have to decide the point, I do not consider that this would in fact amount to gross misconduct as the Respondent asserts. But for the Claimant having been (as I find) wrongfully and unfairly dismissed this conduct would not have occurred in any event. At the date of this action the Respondent as well as having already dismissed the Claimant -which is the clearest evidence of an intention no longer to be bound by the contract - was also itself in fundamental breach of contract by having failed to pay the Claimant his proper wages and by having denied his contractual entitlement to notice.

12. Even if the Claimant had been summarily dismissed within the currency of the notice period – which of course he was not – I am perfectly satisfied in these circumstances that it would have been just and equitable to award him the whole of the redundancy payment under section 140 (3) and (4) of the Employment Rights Act 1996. There is no power to reduce the amount of the Redundancy payment where the notice of termination in fact runs its course and there has been no actual summary dismissal as defined by section 140 (1).

Unfair Dismissal

13. Although redundancy is, of course, a fair reason for dismissal I find that the Respondent did not act fairly in this instance. Although there had been discussions about the financial state of the business and the possible implications for the two employees I find that there had not been any proper and meaningful consultation with the Claimant. He was not prior to 19th March given any warning that he alone of the two employees was to be dismissed. Nor was there any opportunity for consideration of any alternatives: he was simply presented with an unsuitable alternative job offer.

14. The dismissal was therefore procedurally unfair. However, I find that had a fair procedure in fact been carried out it would, on the balance of probabilities, only have delayed the dismissal by 4 weeks. Had that process of proper consultation been initiated on 19th March and the Claimant given proper notice of termination at the end

of it, his dismissal would therefore have been effected 6 weeks later that it actually was, that is 13th May 2018.

15. The amount of the compensatory award for unfair dismissal is therefore limited to 4 weeks net pay plus the conventional award to compensate for the loss of accrued statutory rights.

16. It would not be just and equitable to reduce that award on the grounds that the Claimant might have been fairly dismissed for misconduct earlier than 13th May. I have not allowed the Respondent to adduce at this late stage, and without prior notice, any further evidence which they might have in this respect as it would not be in accordance with the overriding objective. The date for disclosure of documents was 7th August 2018 and for exchange of witness statements 21st August 2018. Even by the date of this hearing the Respondent had not actually disclosed any further documentation or additional witness statement. Therefore neither I nor the Claimant know what this purported new evidence may be. There have already been two postponements of this final hearing one at the instigation of each side, admittedly with good reason. A further delay to allow investigation of possible new evidence that could and should have been available months ago would not be proportionate nor in the interests of justice. On the evidence actually before me I am not satisfied that the Respondent would have been fairly entitled to dismiss any earlier than the date when the full notice, if given at the appropriate time, would have expired.

Wrongful dismissal

17. At the time the Claimant began work a written contract was drawn up by the Respondent although never in fact signed by either party. That provided for 1 months notice of termination. I find that that represented the agreement between the parties. Alternatively the reasonable period of notice to be implied in such circumstances is the same, 1 month. The Claimant was only given the statutory minimum 2 weeks' notice on what I find to be the spurious grounds that he had not actually signed the contract, even though the Respondent knew full well that this was the agreement.

18. The Respondent is not entitled to set off against this breach of contract claim the purported overpayments of wages made by the Saeedi family personally in January and February 2018. There was not, I find, ever any concluded agreement to vary the Claimant's contract so that his pay was reduced to £1200.00 gross per month.

19. The Respondent asserts that this was agreed at a meeting on 17th January 2018. Dr Dariush Saeedi's personal notes of that meeting do record an apparent agreement that the Claimant's pay and hours would be reduced. Significantly however they do not say what those reductions were to be.

20. The pleaded case is that at that meeting "a fall in sales income was discussed and it was confirmed that the reduced salaries would be paid in February but there would be a further reduction in March unless sale income increased significantly". That is in fact, in my view, entirely consistent with and indicative of the inchoate nature of any agreement. This was at most an "ad hoc" arrangement to cover cash flow problems as and when they arose.

21. At an earlier meeting on 3rd January there had also been discussion about the company's precarious financial position and Mrs Saeedi had given an undertaking

personally to guarantee the Claimant's salary for January. In context I am quite satisfied that that guarantee was to pay the full salary and not merely any reduced amount. I do not accept the Respondent's evidence to the contrary. Again Dariush Saeedi's note of that meeting is conspicuously silent as to any figures. Within Mr Masoud Saeedi's dismissal email of 19th March, which Dariush Saeedi saw and approved, the reference to that guarantee of salaries only up to January is, I am satisfied, to be understood as a guarantee of the full salary.

22. The Claimant, as was his fellow employee Dr Yahyaei, was in fact paid in full for January. Dariush Saeedi then sought to recover the excess over £1200.00 from each of them but only Dr Yahyaei agreed to repay any monies. Masoud Saeedi then also paid the full salary to the Claimant in February also, most of it from his and his wife's personal account. Within the Dismissal email he did not seek to claim that these payments in January and February were in fact overpayments that could be recoverable and offset against any further sums owing. Rather he stated that he was unilaterally determining the amount of the salary he would pay for March, acknowledging that there had been no prior agreement with the Claimant in this regard. The claim for a set off was not made until a letter from the Respondent to the Claimant dated 4th September 2018. There has never been an employer's contract claim made in these proceedings. It was only at the start of this hearing that the Respondent in fact alerted the Tribunal to its claim to set off these sums, relying on the authority of ***Ridge*** v ***HM Land Registry*** UKEAT/0485/12.

23. I find therefore that although the Claimant was prepared in principal to defer his entitlement to his full salary in order to assist the Respondent there was never a concluded agreement that he would in fact do so. I am certainly satisfied that there was never any agreement that the Claimant would permanently forgo his entitlement to full salary due on any occasion. The Respondent, on the contrary, made specific arrangements to ensure that he was paid in full for February and did not, prior to dismissal, make any allegation that there had been any actual variation of the contract. The assertion that there had been such an agreed variation is, of course, on the face of it inconsistent with the Claimant being said to have been dismissed on 19th March because he had refused to accept a change in terms and conditions. The Respondent certainly did not ever expect that the Claimant would decreace his hours so that they would be commensurate with a reduced annual salary of only £14,400.00 gross. There is no suggestion that he was ever in fact put on "short time". The Claimant was paid in arrears so that any purported agreement on 17th January that his salary reduce so dramatically would not take into account that for more than half the month he had in fact been working his full contractual hours. As the Claimant correctly points out to be paid £1200.00 for a month in which he had worked at least his minimum 37 ½ hours per week would have resulted in his being paid less than the National Minimum Wage.

24. There is, I find, nothing whatsoever in the exchange of emails between the parties that is inconsistent with the Claimant's position. That is that he was prepared to defer salary payments, possibly to have the shortfall topped up by "expenses" as and when funds were available. In so far as the Respondent asserts that the emails in fact show that there was a concluded agreement they are at best ambiguous and that ambiguity is accordingly to be construed against the Respondent.

Unauthorised Deduction from Wages

25. The admittedly unilateral reduction in salary for March which was effected by the 19th March email is therefore an unauthorised deduction from wages under section 13 of the Employment Rights Act 1996.. The sum properly payable was still the full salary without variation and he had never consented in writing to Masoud Saeedi's figure. In fact before the payment date the Claimant expressly reasserted his entitlement to his full salary.

26. Although the written contract is silent on this topic the original job offer was clearly made in contemplation of commission being paid as well as the basic salary. I am satisfied that the subsequent chain of emails between the Claimant and Masoud Saeedi shows that a figure of 10 percent on the value of new sales – a figure which initially came from the Respondent – was agreed upon.

27. What was not agreed was the mechanism for payment of that commission. Again there was an agreement that the Clamant would be prepared to defer receipt of the due commission to assist with the cash flow problems of the business. No commission was ever in fact paid to him during the currency of his employment. The Respondent did however affirm its "commitment" to pay commission.

28. I find therefore that commission at the agreed rate was outstanding and payable to the Claimant at the date of termination.

29. The Claimant is best placed to assess what he was owed and I accept his figure as pleaded and confirmed in evidence. The Respondent has never put forward any alternative basis of calculation.

Holiday Pay

30. The Claimant was contractually entitled to 20 days holiday plus bank holidays. That is the minimum entitlement under the Working Time Regulations 1998 of 5.6 weeks, 28 days on a 5 day working work.

31. The Respondent's holiday year is from 1st January. Up to 1st April the Claimant had therefore accrued a pro rata entitlement to 1.4 weeks, that is 7 days holiday.

32. He had taken New Year's Day as holiday and also 1 ½ days, Thursday afternoon and Friday, at the end of the first week of his notice period.

33. In the absence of any documentary evidence from either side I accept the Claimant's assertion that he had only taken minimal further leave and that there is still therefore 3 ½ days outstanding.

34. I do not accept the Respondent's argument that it is entitled to deem the second week of notice to have been "holiday" because it does not believe that the Claimant was devoting himself fully to his duties at this time. There is no evidence that any further time in this period was actually taken as leave. Masoud Saeedi wrote an email on the Monday of that week , 26th March, indicating that he was disappointed because he believed that the Claimant had said he was going to take the rest of that week off. That is, however, in my view simply a clear misinterpretation of the Claimant's email indication that he would take time off on 22nd and 23rd, at the end of the first week. The

Claimant, I find, only actually took 3 ½ days of his 7 day entitlement and he is to be paid for the balance as calculated under regulation 14 of the 1998 Regulations.

EMPLOYMENT JU DGE LANCASTER

DATE 15th February 2019