



EMPLOYMENT TRIBUNALS

Claimant: Mr Shah Ali
Respondent: NR LTD
Heard at: East London Hearing Centre (by CVP)
On: 26 October 2021 and 13, 14, 15 and, 16 December 2021
Before: Employment Judge Speker OBE DL

Representation:

Claimant: In person
Respondent: Mrs Rosana Cannetti (Counsel)

RESERVED JUDGMENT

The reserved judgment of the Employment Tribunal is as follows: -

1. The claim of unfair dismissal is unsuccessful, and the claim is dismissed.
2. The claim for notice pay/breach of contract is dismissed.
3. The claim for failure to give written reasons for dismissal is dismissed.
4. The claim for failure to provide a written statement of terms and conditions of employment is dismissed.
5. The claim for payment in relation to accrued pay for annual pay is successful. It is ordered that both parties by 4pm on 24 January 2022 file in the tribunal and serve upon each other a calculation of the Claimant's entitlement to payment for outstanding holiday.

REASONS

1 The Respondent, Mr Shah Ali, brings claims for unfair dismissal, notice pay, failure to give written reasons for dismissal, failure to pay notice, failure to provide a statement of written terms and conditions of employment and for unpaid accrued annual leave (holiday pay).

2 Dismissal was not admitted by the Respondent who alleged that the Claimant resigned during a telephone conversation between him and Mr Mohammed Azhil Hussain. The Claimant alleged that he was dismissed by an email sent to him by Mr Hussain on 19 February 2021 enclosing his form P45.

3 The case was originally listed for one day on 26 October 2021, there having been no detailed case management hearing, but only standard directions issued on 4 June 2021. On 26 October, it was immediately obvious that the case required more than a one-day final hearing. On the 27 September, the tribunal had written to both parties asking if they were ready for the hearing on 26 October and had complied with the case management orders made on 4 June. The Claimant and Respondent both replied in the affirmative on the 30 September and 4 October respectively. Neither indicated that more than one day would be required even though they knew that there were to be four witnesses giving evidence and a bundle of documents running to 235 pages. Both parties were acting in person with no solicitors on the record although solicitors were apparently involved as far as the Respondent were concerned as they instructed Mrs Cannetti who appeared after the hearing on 26 October, and thereafter. Subsequently, at my request, the position was regularised and the solicitors acting for the Respondent emailed to the tribunal to confirm that they were acting for the Respondent and words were to be placed officially on the record. this occurred during the December hearing. The Claimant acted throughout on his own behalf, although had had some assistance and advice in relation to the preparation to his case and opening skeleton argument produced for 26 October. Counsel for the Respondent also prepared an initial skeleton dated 25 October 2021.

4 For the hearing, I was provided with a cast list to which both parties had contributed. There was also a 'suggested' list of issues prepared by the Respondent, putting the issues under the following headings:

1. Resignation
2. Unfair dismissal
3. EDT/ Notice pay / holiday pay
4. Policy and procedure/ fairness
5. Compensation

5 As dismissal was not admitted, the Claimant's case was presented first. Before he gave evidence, both parties agreed that there should be some reading time. Following

preliminaries, the case was stood down for me to read essential documents. The tribunal had been set up as a full tribunal, with two non-legal members present. However, as there were no issues before the tribunal which required a full tribunal, the non-legal members were released before the hearing commenced and they were disconnected from the CVP.

6 The evidence and submissions lasted for four days. As dismissal was not admitted, the Claimant's case was presented first. He gave evidence on his own behalf. The Respondent called three witnesses, namely, Mr Dinar Ahmed a former employee of the Respondent, Mr Mohammed Azhil Hussain managing director of the Respondent and Mr Mohammed Meraj an estate agent who had been a director of the Respondent company but resigned in January 2014. Mr Hussain was at his request provided with the assistance of an interpreter in Sylheti/Bengali. The interpreter was Mr Mohammed Salah Uddin who was online for a period until Mr Hussain gave his evidence and then disconnected from the call as soon as Mr Hussain's testimony and cross-examination were complete. The claimant applied for an order that Mr Hussain and Mr Ahmed should not be online while he, the claimant, gave his evidence as the claimant considered it would be unfair for them to hear his evidence. I heard arguments in both sides and rejected the application. There was no justification for excluding the two witnesses.

The Facts

7 The following facts were as established:

7.1. The Respondent is a travel agency business, mainly serving customers with a Bangladeshi background. A substantial part of the business relates to air tickets and tours for two Islamic pilgrimages, The Hajj and Umrah. Both of these pilgrimages take place in Saudi Arabia and the Respondent deals with the sale of flights and arrangements. The Respondent trades under the name Al-Safa Travel. The Respondent's registered office is at 13 Fordham Street, London. Al-Safa Travel has its office at 467 Romford Road, London. The Managing Director is Mr Mohammed Azhil Hussain. His brother-in-law is Mr Gulam Kibria who in the past had been a director of the Respondent company but resigned on 2 June 2011. Mr Kibria was described as an Islamic scholar and was held out by the Respondent with the title of Chairman of the travel business and Organiser of pilgrimage tours. It was the Claimant's case that Mr Kibria remained in a position of authority with regard to the Respondent and that he was the owner of the company and the decision maker. This was an issue as the Respondent entirely denied that Mr Kibria retained any actual, practical or legal decision-making power.

7.2. The Claimant commenced employment with the Respondent in October 2015. He was a senior travel consultant, already experienced in dealing with Hajj and Umrah travel and therefore able to commence duties with the Respondent without training. There was no written contract of employment. The essential terms of employment were that the Claimant would work 24 hours per week which was stated to be a number of hours he could work without affecting his working tax credit. He was based at the office at 467 Romford Road. He was to receive two weeks paid holiday, which would be extended to four weeks if he wished to visit Bangladesh for holidays. He was also provided with time to take breaks for ablution and prayer and had paid leave for Eid festival days.

7.3. There was no indication that the Claimant performed his working duties other than in a satisfactory manner. It appeared that he enjoyed a good working relationship with Mr Hussain. They also regarded themselves as family friends. In addition, when the Claimant wished to arrange money transfers to Bangladesh, these would be processed by Mr Hussain and this continued into 2021. The Claimant mixed socially with Mr Hussain.

7.4. Because of the coronavirus pandemic and the effect on the travel business from March 2020, the Respondent's employees including the Claimant were put on furlough under the coronavirus job retention scheme (CJRS). From then, the Claimant received furloughed salary (80% of regular salary) throughout 2020. The money was paid on time until late in the year. In mid-November, the furlough payments were made for the October salary. In December, Mr Hussain began to self-isolate and was at home and not in the office. He informed the employees including the Claimant that because of this, he would not be able to make the furlough payments in December as he required a device in order to process the money and this was kept in a safe in the office. Mr Hussain indicated that there would be a delay and he would deal with the payments as soon as he could open the office. During this period, he was able to continue making money transfers including those requested by the Claimant because in order to process these, he did not need the device referred to or need access to the company computer in the office.

7.5. On 30 December 2020, the Claimant telephoned Mr Hussain with regard to the Respondent's failure to pay the furloughed salary. There was a heated conversation during which the Claimant suggested that there was some irregularity arising from the delay bearing in mind that the furlough moneys were being paid to the Respondent in order to pass on to employees as salary. The Claimant alleged that the Respondent was behaving unlawfully or dishonestly. As a response, Mr Hussain emailed to the Claimant on 30 December 2020 a copy of a document headed 'NR Limited profit loss account' for the year ended 9 June 2020 on which an amount was shown as 'other operating income £47324' which was intended to demonstrate that furloughed money was being properly accounted for by the Respondent company.

7.6. There were two telephone conversations between the Claimant and Mr Hussain late on 1 January 2021. These were not mentioned in the Claimant's witness statement or in his skeleton argument but evidence of the calls was supplied by telephone logs and these were dealt with in the statement by Mr Hussain. In the first call, Mr Hussain alleged that the Claimant referred again to the absence of the furlough money as well as the fact that he had financial commitments. Also, the Claimant stated that he proposed to leave his employment with the Respondent and he mentioned that he was concerned that the Hajj and Umrah pilgrimage business would not return soon and that he did not see a future for the travel business. Mr Hussain agreed with that assessment, but he suggested that the Claimant should not be risky but should think about this before making a decision and discuss it with his wife. The Claimant telephoned Mr Hussain again that evening about two hours later saying he considered the position again, and he had made his decision that it would be best for him to leave and he asked Mr Hussain to accept his resignation. Mr Hussain said that he would continue to deal with money transfers if required. For his part, the Claimant entirely denied that he had resigned. He accepted that he had telephoned twice on 1 January but that these calls were firstly to enquiry about

Mr Hussain's health and the health of his family and on the second occasion, to give details with regard to a money transfer which he wished Mr Hussain to process. The content of these calls was a crucial and essential issue in the case.

7.7. The Claimant thereafter took advice from an accountant as to what he had been told by the company in relation to the delay in processing furlough moneys correctly.

7.8. On 4 January 2021, the Claimant sent to Mr Hussain, a payment request in relation to transfer of money to Bangladesh and this was dealt with in the customary pleasant manner.

7.9. On 9 February 2021, the Claimant telephoned Mr Kibria regarding the delay in payment of the furlough salary and Mr Kibria said he would speak to Mr Hussain about it. He telephoned Mr Ali on the 10 February and there were discussions with regard to the delay in payment. On 6 February, the Claimant had sent a message to Mr Hussain asking for his last three months' payslips saying he needed these urgently. He also continued to request money transfers. Mr Hussain provided the three payslips which were for November and December 2020 and January 2021, the last of these referring to a pay date of 5 February 2021 and each of the payslips were showing net pay of £725.50.

7.10. On the evening of 1 January 2021 at 22:15, Mr Hussain sent an email to the Respondent's accountant stating 'I write you to let you know that one of our employee (sic) named Mr Shah Asrah Ali is no longer working for NR Limited. From 01 of January 2021, please remove his name from PAYE. Also, please can you provide P45'. There was also a handwritten note made in Mr Hussain's work diary stating 'Asraf Bahi confirmed to resign'.

7.11. On 12 February 2021, the Claimant emailed to Mr Hussain acknowledging the three payslips and requesting payments of the outstanding furlough moneys, referring to the Claimant 'facing severe financial crisis'. Mr Hussain replied by email on the 15 February stating that the payment would be made 'by this Friday'. The email was addressed 'Dear Mr Ali' which the Claimant maintained demonstrated a difference in the relations between the two men. The Claimant stated that previously Mr Hussain always addressed him as 'Bhai' - brother.

7.12. On 16 February 2021, a sum on £2176.50 was transferred by the Respondent into the Claimant's bank account as shown on a Halifax statement review.

7.13. On 19 February 2021, the Respondent emailed the Claimant stating as follows, 'Further to our telephone conversation in January regarding your employment, you expressed your desire to leave. I have attached you P45 and your last payment for January has been paid into your account.' On 21 February, the Claimant replied in a detailed email to Mr Hussain expressing his surprise at receiving his P45 and stating that he had not received any notice of termination of employment and denying that he himself had given notice of termination. The Claimant gave his account of the conversations and exchanges of message. The email took exception to the delays in making payment of furlough moneys and made reference to the Claimant's conversations with Mr Kibria. The email also made an allegation of embezzlement, threats of dismissal and used the words 'punish mental dismissal'.

7.14. On 22 February 2021, the Claimant emailed Mr Hussain again under the heading 'appeal to withdraw unfair dismissal and continue to government coronavirus job retention scheme (furlough)' in which he again denied the termination of the contract and alleged this was an unfair dismissal and stated that Mr Ali was seeking legal advice. He also made reference to mediation, conciliation or arbitration and that if the 'unfair dismissal' was not withdrawn, that Mr Ali would take a case to the employment tribunal. He asked for a reply by 5.30pm on 25 February and for reinstatement before 28 February.

7.15. On 26 February, at around 10am, there were two emails, one from the Claimant to Mr Hussain and another from Anamul Hassan (an employee of the Respondent, who is also the son of Mr Kibria) to the Claimant. The email from Mr Hassan was said to have been sent on instructions from Mr Hussain. It took issue with allegations made by the Claimant and stated that the Claimant had resigned in January and the resignation had been accepted. It also posed six specific questions to the Claimant, including challenging the reference to embezzlement, the allegation of unfair dismissal, why the Claimant wished to remain on the furlough scheme, why he felt he had not been treated fairly and for the Claimant to produce various documents. The email from the Claimant referred to the Claimant wishing to appoint a mediator, that he was a shielded person in relation to Covid and that he wished three named persons, Mr Uwlah, Mr Choudhury and Mr Emran Hussain to be involved in some type of alternative dispute resolution. He also asked that the matter be resolved that day, namely 26 February.

7.16. On 27 February, Mr Anamul Hussain emailed the Claimant again stating that the Respondent had been aware that various allegations had been made by the Claimant to other members of the community and that these constituted 'serious untrue and highly defamatory comment towards our firm' and that the Claimant should stop making such comments and there was a threat of High Court proceedings.

7.17. The Claimant approached Mr Dinar Ahmed who had been a former employee of the Respondent and a person the Claimant said he held in high regard and asked if he would assist in trying to mediate. Mr Ahmed suggested that Mr Mohammed Meraj, an estate agent known to both and who had been a former director of the Respondent company, would be better placed to undertake this role and the Claimant invited Mr Meraj to do so. Mr Meraj said he would speak to Mr Hussain to see whether there were any prospects of the Respondent reinstating the Claimant. He spoke to Mr Hussain and was told that this was not agreed. Both Mr Ahmed and Mr Meraj stated in evidence that when the Claimant had contacted them, he informed each of them that he has resigned from his employment with the Respondent.

7.18. A meeting then took place on 28 February 2021 at the office of Mr Meraj. This was attended by the Claimant and by Mr Mehr, Mr Ahmed and Mr Kibria and others. Mr Hussain did not attend and nor did Mr Anamul Hassan. The Claimant maintained that this was a formal business meeting called by the Respondent; the Respondent's case was that this was an informal meeting, not arranged by the company. The meeting involved a heated exchange between Mr Kibria and the Claimant which appeared to involve suggestions as to past problems which the Claimant had had during his employment and Mr Kibria suggesting that the Claimant had resigned and was seeking to persuade the company to reinstate him so that he could claim

furlough money. The meeting did not produce any resolution. It was the Claimant's case that he should be reinstated at least until the end of the furlough scheme and he could then be dismissed formally by the Respondent. The Claimant asked that the Respondent formally consider that suggestion. The position of the Respondent through Mr Hussain was that this was a company matter and that the company was not involved in the informal meeting held on 28 February.

7.19. Following the meeting, Mr Meraj contacted Mr Hussain to ask whether the company was prepared to re-engage or reinstate Mr Ali. Mr Hussain replied in the negative.

7.20. The Claimant did not reply at this stage to the letter alleging that he had made defamatory statement about the company or to the six questions that had been posed in the email from Anamul Hassan.

7.21. On 14 March the Claimant emailed Mr Hussain at length placing a number of complaints against the Respondent including the delays with furlough moneys and formally asking that the Respondent's decision be withdrawn within 7 calendar days or legal action would be taken.

7.22. On 26 March, the Claimant wrote again to Mr Hussain suggesting that he had answered the six questions at the informal meeting on the 28 February but then setting out his formal replies to the six questions.

7.23. On 30 March, the Claimant emailed to Mr Hussain referring to his letter 14 March as being a formal grievance and request for reinstatement and asking for a reply within 5 days.

7.24. On 1 April 2021, the Claimant contacted ACAS under the early conciliation process and an early conciliation certificate was issued on 6 April 2021. The Claimant presented his claim to the tribunal on 26 May 2021. Additional documentation produced included Facebook entries with respect to the activities and status of Mr Kibria with regard to the Respondent.

Submissions

Respondent:

8 In addition to the opening skeleton provided by the Respondent, Mrs Cannetti provided an enlarged document entitled closing submissions on behalf of the Respondent, dated 16 December 2021. This included added comments with regard to the evidence heard by the tribunal. Time was granted for Mr Ali to consider that document. Mrs Cannetti then supplemented this with oral submissions. She submitted that the evidence was clear that the Claimant had resigned during the telephone conversation on 1 January 2021. She said that this was corroborated by the note made contemporaneously by Mr Hussain and the email sent that night to his accountant. Further corroboration was from the evidence of Mr Ahmed and Mr Meraj, both of whom stated that the Claimant had confirmed to them that he had resigned and was wanting to withdraw the resignation and get his job back. She asked that the evidence given by Mr Hussain, Mr Ahmed and Mr Meraj should be accepted and that they were credible.

8.1 She argued that the resignation was unequivocal and the action of the Respondent through Mr Hussain was reasonable in asking Mr Ali to think carefully about what he was communicating and to discuss it with his wife which he said he had done when he telephoned again two hours later confirming his intention to resign.

8.2 Mrs Cannetti submitted that this was an effective resignation and it brought the employment to an end. This was not a case of constructive dismissal as this would involve the Claimant accepting that he had resigned and that he had done so in response to a repudiatory breach of the employment contract by the Respondent. The Claimant was clearly not advancing this as an argument and therefore it was not open for the tribunal to make any finding with regard to constructive dismissal, where the Claimant was denying resignation.

8.3 She asked the tribunal to consider the possibility that if resignation was not accepted, that the Respondent had dismissed the Claimant by sending him his P45 on 19 February, and if that was done then the Claimant was being dismissed for some other substantial reason.

8.4 Mrs Cannetti further submitted that the Claimant's actions with regard to the dismissal conversation and thereafter were unreasonable and that it was invalid for him to suggest that Mr Kibria remained the owner, chairman and directing mind of the Respondent and that Mr Kibria's role was clearly explained by evidence which was produced.

8.5 With regard to the Claimant's own evidence, the Respondent position was that the Claimant's evidence was unreliable when compared with that given by the Respondent's witnesses.

8.6 Mrs Cannetti referred to the legal framework. With regard to the resignation, she referred to the case of *Sothorn v Franks Charlesly & Co* [1981] IRLR 278 and *Kwik-Fit (GB) Limited V Lineham* [1991] UKEAT 250 as supporting her arguments with regard to the unambiguous words of resignation and allowing the cool-off period. She also referred to the case of *Ely v YKK Fasteners (UK) Limited* [1993] IRLR 500 CA. She referred to section 98 of the Employment Rights Act 1996 with regard to the question of the reason for dismissal and the concept of constructive dismissal. She also made detailed submissions as to the ACAS code. She argued that the code was not relevant bearing in mind that there was no active dismissal and similarly averred that the Claimant was not entitled to a written statement of the reasons for dismissal on the same basis and that the claim for failure to provide written statement of particulars should only be relevant if there was a finding of unfair dismissal.

8.7 As to outstanding holiday pay, she was not able to assist the tribunal as to any calculation but commented with the regard to the Claimant's contractual entitlement.

Claimant:

8.8 Mr Ali relied upon his detailed skeleton which he provided at the commencement of the hearing. He argued that he had been dismissed without notice on 19 February 2021 without any valid reason. He disputed the allegation that he had resigned. He argued that the evidence of Mr Hussain, Mr Ahmed and Mr Meraj should

not be accepted and he argued that they had given false evidence to the tribunal in this respect and in relation to each of the three witnesses, he stated that they had committed perjury.

8.9 He submitted that the discussions as to his concerns in relation to his employment took place on 30 December and not on 1 January. He had not mentioned the telephone calls of 1 January even though these were shown on the telephone logs because he said that they related to an enquiry about health and arrangements for a money transfer.

8.10 He argued that the situation changed when he began to formally request payment of the furlough money which was outstanding and suggested that he would report the company to the authorities with regard to the delay in payment and the unlawful way in which furloughed money was being retained and not distributed. He maintained that it was significant that the P45 was so delayed. If the evidence of the Respondent was correct and Mr Hussain had informed his accountant on 1 January 2021 that he the Claimant had left employment, then it made no sense that the P45 was not sent to him until 19 February. His case was that there was an effective and unfair termination of his employment by sending him an email with his P45 on 19 February. No process was followed with regard to the dismissal and there was a clear breach of the ACAS code. There should have been a disciplinary process and he should have been granted a right of appeal against his dismissal. He argued that the Respondent failed to provide him with written reasons for the dismissal. Also, there had been no provisions of written statement of terms and conditions of employment. He claimed that he had outstanding holiday pay.

Findings

8.11 The central issue in this case was whether the Claimant's employment came to an end by his resignation in a conversation between him and Mr Hussain on 1 January 2021 or whether it was ended by Mr Hussain sending an email with Form P45 on 19 February 2021.

8.12 In resolving this issue, I heard detailed evidence from the Claimant who entirely denied uttering any words of resignation or intention to terminate his employment, effectively stating that this was a self-serving account made up by the Respondent because they were concerned that he was alleging impropriety with regard to furlough money. Mr Ali suggested that it was when he began to make formal requests for the payment of furlough money and was indicating that, on accountancy advice, he was to refer the matter to the authorities, that the Respondent then decided to terminate his employment.

8.13 As against this, Mr Hussain maintained that he was very clear that Mr Ali communicated his resignation and was then given time to think about it and discuss it with his wife which he did. Mr Hussain insisted that he then made a note of this and sent off an email the same night confirming the position to his accountant. Corroboration was provided by Mr Meraj and Mr Ahmed. In assessing the strength of this evidence, it was significant to note that the Claimant himself described both Mr Ahmed and Mr Meraj in complimentary terms. He had described Mr Ahmed as a very good man and had wished to have involve Mr Ahmed in mediation because he

felt that he would be supportive. Mr Ahmed was the person upon whom he could rely. Similarly, with respect to Mr Meraj, the Claimant had said that he was a person that the Claimant would want to be nominated as a mediator. Both of these witnesses had stated clearly that Mr Ali had told them that he had resigned from his job with NR Limited and was trying to get his job back.

8.14 When Mr Ahmed and Mr Meraj persisted with this account in their evidence, despite challenges, the Claimant maintained that they had both committed perjury and were giving false evidence. He raised a number of issues against both of them endeavouring to suggest that their evidence was the result of pressure or undue influence from the Respondent. He was also maintaining from very lengthy evidence, including entry on Facebook and photographs taken of meetings or television appearances, that Mr Kibria was the deciding mind of the Respondent.

8.15 My conclusion with regard to the conflict is that I am persuaded by the evidence advanced by the Respondent that Mr Ali did resign in a conversation which he had with Mr Hussain. I accept the corroborative evidence given by Mr Ahmed and Mr Meraj who presented as convincing witnesses. It was of significance that the Claimant had stated that he trusted both of these gentlemen and it was through his choice that they became involved in attempting to assist the Claimant to secure the outcome he wanted from Mr Hussain namely reinstatement. I find on the evidence and the corroboration provided, that Mr Ali's employment came to an end because of his resignation.

8.16 I find that the resignation was unequivocal, and that Mr Hussain acted properly in allowing the Claimant two hours to cool off and discuss the matter with his wife before confirming that he indeed wishes to resign.

8.17 The decision to resign was closely examined and it appeared that this was likely to have been because the Claimant had intended to claim benefits but subsequently discovered that he could not receive benefits because it was stated that he had resigned from his employment. This was the basis upon which he was asking the Respondent to reinstate him and then dismiss him 'formally' at the end of the furlough period. I reached to the conclusion that the Claimant was aware that his employment had come to an end, that on receiving the P45, albeit delayed, that he sought to suggest that he had been dismissed.

8.18 I therefore find that there was no dismissal and therefore, there can be no finding of unfair dismissal. The resignation was not in circumstances which could give rise to a constructive dismissal bearing in mind that the Claimant himself denied having resigned and therefore it could not be said that this was a response to any repudiatory breach.

8.19 Therefore, the unfair dismissal claim is dismissed.

8.20 I further dismiss the claim of failure to provide written reasons for the dismissal as I have found that there was no dismissal.

8.21 I dismiss the claim in relation to failure to provide stately written terms of conditions of employment as this is not a free-standing right.

8.22 As to the claim for notice payment, the Claimant was given one-month notice until the 1 February 2021 which was in fact notice given by the Claimant himself on resignation, that he was paid for the month of January. There is therefore no outstanding claim for notice.

8.23 Finally, the decision with regard to unpaid holiday pay was unclear. It seems that the Claimant may well have an outstanding entitlement to accrued annual leave. An order has been made for both sides to provide calculations. The matter maybe capable of being dealt with on payment without a further hearing.

**Employment Judge Speker OBE DL
Date: 21 December 2021**