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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110266/2021 (V)

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Held on 10 December 2021 (By Cloud Video Platform)

Employment Judge: R King

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Mr Colin Rodger

**Claimant
Represented by:
Mr Anderson -
Solicitor**

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Alexander Sloan Financial Planning Limited

**Respondent
Not Present and
Not Represented**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that –

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(1) the claimant was unfairly (constructively) dismissed and is entitled to a basic award of £16,320 and a compensatory award of £250.

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(2) the claimant suffered unlawful deductions from wages, contrary to the provisions of section 13 of the Employment Rights Act 1996 in the sum of £123,348.80; and (2) the respondent is ordered to pay to the claimant the sum of £123,348.80; said sum to be paid gross, the claimant being liable to HMRC for any payments of income tax and national insurance thereon.

REASONS

1. This is a claim of unfair constructive dismissal and for unpaid wages. The respondent did not lodge an ET3 response. Although it had been notified of the hearing date and provided with joining details, it did not attend the hearing.
- 5 2. The claimant gave evidence on his own behalf and a bundle of documents was produced.

Relevant Law

Constructive Dismissal

3. The Employment Rights Act 1996, Section 95 (1)(c) provides that an
10 employee is to be regarded as dismissed if -

“the employee terminates the contract under which he was employed (with or without notice) in circumstances which he is entitled to terminate it without notice by reason of the employee’s conduct.”

4. The leading case on constructive unfair dismissal is **Western Excavating
15 (ECC) Limited v Sharp [1978] ICR 221** in which Lord Denning held that :-

*“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from
20 any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed.”*

5. While that reasoning has stood the test of time the law in this area has been altered by the emergence of the implied term of trust and confidence, which was approved by the House of Lords in *Malik and another v Bank Of Credit &
25 Commerce International SA (in compulsory liquidation) [1998] AC 20* when it held that this implied term means that –

“The employer must not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the

relationship of trust and confidence between employer and employee" (Lord Steyn).

6. In ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978*** the Court of Appeal held that where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

- What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
- Has he or she affirmed the contract since that act?
- If not was that act (or omission) by itself a repudiatory breach of contract?
- If not, was it nevertheless a part (applying the approach explained in ***Waltham Forest v Omilaju [2004] EWCA Civ 1493***) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a previous affirmation, because the effect of the final act is to revive the right to resign.)
- Did the employee resign in response (or partly in response) to that breach?

7. In ***Waltham Forest*** the Court of Appeal held that the 'final straw' must contribute something to the breach, although what it adds might be relatively insignificant.

The final straw must not be utterly trivial.

The act does not have to be of the same character as earlier acts complained of.

It is not necessary to characterise the final straw as "unreasonable" or "blameworthy" conduct in isolation, though in most cases it is likely to be so.

An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

8. Unlike the statutory test for unfair dismissal, there is no band of reasonable responses test. It is an objective test for the Tribunal to assess whether, from the perspective of a reasonable person, in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and to refuse to perform the contract. (*Tullet Prebon plc v BGC Brokers LP 2011 IRLR 420*)

9. There is no rule of law that a constructive dismissal is necessarily unfair. If it finds there has been a constructive dismissal a Tribunal must also consider whether that dismissal was fair or unfair having regard to section 98(4) of the Employment Rights Act 1996, which provides -

“ (4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case”

10. The Tribunal must therefore consider whether the respondent had a potentially fair reason for the breach (*Berriman v Delabole Slate 1985 ICR 546*) and whether it was within the range of reasonable responses for an

5 employer to breach the contract for that reason in the circumstances. When making this assessment, the Tribunal must not substitute its own view of what it would have done but consider whether a reasonable employer would have done so, recognising that in many cases there is more than one reasonable response.

11. Unauthorised deductions

1. Section 13 of the Employment Rights Act 1996 provides as follows:-

“13. Right not to suffer unauthorised deductions

10 (1) An employer shall not make a deduction from wages of a worker employed by him unless –

(a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract or

15 (b) The worker has previously signified in writing his agreement or consent to the making of the deduction”

2. Section 23 of the Employment Rights Act 1996 provides as follows -

“23 (1) A worker may present a complaint to an employment tribunal -

20 (a) that his employer has made a deduction from his wages in contravention of section 13...”

3. Section 24 of the Employment Rights Act 1996 provides as follows:-

“24 ...

25 (1) Where a tribunal finds a complaint under section 23 well founded, it shall make a declaration to that effect and shall order the employee -

(a) in the case of a complaint under section 23(1)(a) to pay to the worker the amount of any deduction made in contravention of section 13.

...

5 (2) Where a Tribunal makes a declaration under sub-section (1), it may order the employer to pay to the worker (in addition to any amount ordered to be paid under that sub-section) such amount as the Tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him
10 which is attributable to the matter complained of.”

Issues

12. The issues for the Tribunal to determine were as follows:-

Unfair constructive dismissal

- 15 • Did the respondent act in fundamental breach of the claimant's contract?
- Did the respondent's breach cause the claimant to resign?
- Did the claimant delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal?
- 20 • If the claimant was unfairly constructively dismissed what is the amount of the basic award and the compensatory award due to him by the respondent.

Wages claim

- Did the respondent make unauthorised deductions from the claimant's wages?
- 25 • If so, what is the amount of the unauthorised deduction?

Findings in Fact

13. Having heard evidence from the claimant the Tribunal makes the following findings in fact.

Background

5 14. The claimant was employed by the respondent between late June 1999 and 22 June 2021 and had completed 21 full years of employment when his employment terminated. Prior to the termination of his employment he was employed as a Financial Adviser. The claimant had no written contract of employment.

10 15. In addition to his being an employee the claimant was also a director and minority shareholder in the respondent's business, holding a 26% share. The claimant's co-directors were Kevin Booth and Mark Mulholland who were not employed by the respondent but were employees of Alexander Sloan Accountants, which is a separate business.

15 16. During the vast majority of his employment the claimant's main duties involved dealing with the respondent's clients to whom he provided financial advice, principally in the areas of investments and pensions. He was the only financial adviser in the business, which employed only one other employee.

20 17. In addition to providing financial advice to the respondent's clients the claimant was also responsible for overseeing the running of the business, which included ensuring the respondent's compliance with the regulatory obligations and standards set by its conduct regulator, the Financial Conduct Authority (FCA).

FCA visit in July 2018

25 18. In or around July 2018 representatives of the FCA paid a supervisory visit to the respondent. As a result of that visit the FCA immediately invited the respondent to voluntarily temporarily relinquish its authorisation to carry out regulated financial business under FCA auspices pending an investigation into its affairs. In effect this meant the respondent had no choice but to

relinquish its authorisation. As a result, as of July 2018 the respondent was temporarily suspended from carrying out its principal business of providing financial advice, pending the outcome of the investigation.

- 5 19. The immediate impact of the respondent relinquishing its authorisation was that the claimant was rendered unable to continue to carry out his previous role as financial adviser to the respondent's client base. Arrangements were therefore made to direct its clients to an alternative financial adviser to ensure they continued to receive advice.
- 10 20. Although the respondent derived no further income from those clients, a fee was paid by that alternative adviser to Alexander Sloan Accountants in terms of an introducer agreement between them. When the claimant requested details of monies paid to Alexander Sloan Accountants in terms of that introducer agreement his request was refused.

Impact of FCA investigation

- 15 21. While hitherto the claimant's role had been split between managing his client portfolio, running the respondent's business and ensuring its regulatory compliance, he became focussed solely on dealing with the respondent's response to the FCA investigation.
- 20 22. The financial impact on the respondent's business was immediate and profound. Its inability to do business with his customers meant that it had no means of generating any income and only a small cash reserve in the bank. As a result the respondent was unable to pay the claimant's salary after it paid his September 2018 salary and it therefore stopped paying him. The claimant did not agree that he would not be paid and he expected to be paid once the
25 situation with the FCA was resolved.
- 30 23. At this point in time the claimant was unsure how long the investigation could potentially last or even if the business would survive. He believed his first priority was to deal with the FCA investigation and he did not pursue at that stage a formal grievance that he was no longer being paid. However from September 2018 onwards and throughout 2019 and 2020 he discussed the

issue of his non-payment with his co-directors Kevin Booth and Mark Mulholland, keeping them informed that he was still performing a substantial role for the company, albeit by then exclusively in relation to the compliance issues arising from the FCA enquiry.

5 24. Although the claimant was unhappy that he was not being paid he believed that his co-directors expected him to prioritise dealing with the investigation and that he would be paid eventually. His belief was that the existence of the ongoing investigation prevented the respondent from making any payments to him meantime until the investigation had concluded. He also genuinely that
10 he was not permitted to resign during the currency of the FCA investigation as that would remove him personally from its jurisdiction. Nobody from the respondent advised him to the contrary.

25. In the circumstances the claimant chose to prioritise the FCA investigation rather than pursuing payment of his wages. He initially worked on a daily
15 basis with the respondent's solicitors, assisting them to prepare a response to the FCA in respect of the compliance issues that had been brought to their attention. After the respondent's response to the FCA's compliance concerns was submitted the FCA escalated matters to its enforcement division as it concluded that there was sufficient evidence that the respondent may have
20 acted in breach of financial regulations.

26. The situation continued to be incredibly serious for the respondent and for the claimant personally as a number of the FCA's allegations were directed at him. In the circumstances the claimant felt that it was important that he remained with the respondent in order to deal with the investigation and its
25 consequences.

27. Throughout 2019 and the first half of 2020 the claimant engaged fully with the investigation team of the FCA including making several London visits. Eventually the FCA concluded in July 2020 that there had been no wrongdoing on the part of the respondent or the claimant and that it would be
30 taking no further action. The respondent did not discipline the claimant in

relation to any of the allegations that the FCA had made. Nor was he subject to any internal investigation.

Employment with P Daughtrey and S Duncan

28. Since January 2019 the claimant has been employed by P Daughtrey and S
5 Duncan, a local branch of the National Farmers Union, as an administrator
and co-ordinator. In the absence of any income from the respondent the
claimant had no choice but to look for an alternative source of income that
was not in conflict with the respondent's business and one that would allow
him the time to work flexibly in order to deal with the demand of the FCA
10 enquiry. Notwithstanding this other job he remained ready, willing and
available to work for the respondent at all times and remained substantially
involved on the respondent's behalf, assisting it to deal with the FCA
investigation.

Events following the FCA investigation

15 29. Having decided not to reapply for its FCA authorisation the respondent
eventually left the jurisdiction of the FCA in February 2021. That decision was
taken by the claimant's co-directors and the claimant only found out when he
checked the FCA website. The claimant believed that it was only at that point
in time that he was able legitimately to make a claim from the respondent for
20 payment of the arrears of salary that he had not received since the beginning
of the investigation in September 2018.

30. In the circumstances he emailed the respondent on 24 February 2021
expressing his disappointment that *"I had to find out myself that ASFP is no
longer authorised by the FCA and you did not see fit to inform me"* and
25 requesting payment of his unpaid wages. In the absence of a satisfactory
response to that email, he emailed the respondent on 10 May 2021, again
requesting payment of his unpaid salary since October 2018 as well as
confirmation that he would receive statutory redundancy pay should the
respondent ultimately decide to wind up the company following its giving up
30 its FCA authorisation.

31. The claimant received no response to his 10 May 2021 e-mail. He concluded that the respondent had failed to engage with his requests for payment or even to recognise his entitlement to be paid. As a result he emailed the respondent's Mark Mulholland on 22 June 2021 in the following terms:-

5 "Dear Mark

Further to previous correspondence, as you have not engaged with my approaches to come to an orderly termination of my contract I am resigning from ASFP as at today's date.

10 *Notwithstanding the events of the past 3 years I have been employed by ASFP for 22 years. I am now redundant and the company have a legal obligation to compensate my contract. If you refuse to recognise this I am now being forced to resign and so am pursuing a claim for constructive dismissal.*

Colin".

15 32. The claimant's employment with the respondent terminated on 22 June 2021, since when he has continued to work with P Daughtrey and S Duncan from whom he has earned an average gross monthly income of £2,148.51 and an average net monthly income of £1,537.29. He intends to work there for the time being. He has not sought an alternative job to that he did with the
20 respondent since his employment with it terminated.

The claimant's salary with the respondent

25 33. The claimant's gross monthly pay when he was last paid in September 2018 was £5,206.67 from which he was paid £3,012.19 net. His gross weekly pay at that time was therefore £1,201.53 and his net weekly pay £695.12. No changes were made to his salary between September 2018 and the termination of his employment.

Submissions

Submissions for the Claimant

34. Mr Anderson submitted that the claimant had not been paid since September 2018 in circumstances where the earliest time he could have been expected to do anything about his unpaid wages was in March 2021 when the respondent's business was released from its relationship with the FCA. The claimant had discharged his duty by affording his employer an opportunity to remedy the breach in or around March 2021 but it had failed to engage with him.
35. The claimant's genuine understanding and perception of the FCA investigation was that he could not even ask for his money because of the investigation and because of his understanding that the respondent was shackled from paying him either currently or retrospectively. Nobody from the respondent's business advised him to the contrary or informed him that he was not ultimately going to be paid. It was important to stress that the claimant was always "*at the coal face*" and playing a pivotal role on the respondent's behalf in dealing with the FCA investigation.
36. Even if his perception had been incorrect his priority had always been to expedite the investigation, get the respondent "*out of the mire and back on its feet*". The investigation had been left to the claimant to deal with on his own.
37. When the claimant had realised in March 2021 that the company could be required to pay him he did what he needed to do by sending emails to the respondent in an attempt to resolve the outstanding wages. The respondent's breach of contract in respect of its failure to pay him had crystallised in March 2021 when he found out that the company had been released from the FCA, which he had to find out himself.
38. Mr Anderson submitted that the relevant breach was the respondent's failure to pay the claimant his wages, *esto* it had been in breach of the implied duty of trust and confidence when the respondent had failed to deal with his correspondence. In Mr Anderson's view it was a text book constructive dismissal and the long period of unpaid wages had to be viewed in its proper context.

39. Mr Anderson submitted that this was not a case in which the contract had been frustrated. Although the claimant's function on a day to day basis had altered it had ramped up the compliance side of his duties several gears because of his role in the investigation and in particular when it came to dealing with lawyers, London trips and the issue of the investigation.
40. Although he was not doing his day to day work of advising clients he was still performing a significant role from the respondent for which he was entitled to be paid.
41. There had been no discussion with his employer confirming that he would not be paid and he was entitled to proceed on the basis that he would be when the respondent was in a position to do that. In any event his contract had not been frustrated and indeed discharging his duties had taken up a significant part of his day.
42. Even if the contract had been frustrated then it only had been done on a temporary basis. In that respect Mr Anderson referred to the case of ***Notcutt v Universal Equipment Co (London) Ltd [1986] 1 W.L.R. 641***, which he submitted was authority for the proposition that if there was a period of frustration it would be limited to the period of the investigation when he could not do his day to day duties and in that case he would still be entitled to be paid from March 2021 to date.
43. The claimant had taken steps to mitigate his loss in terms of the new job that he had obtained and continued to carry out after his resignation. In Mr Anderson's submission the salary the claimant derived from Daughtrey and Duncan was irrelevant and should not be taken into account until post resignation. Prior to that he simply needed an income, which he derived from work that he could do at the same time as he was engaged on behalf of the respondent. There was nothing in his contract that precluded him from doing a second job and there was no conflict of interest in any event in the NFU job that he took up.

44. Mr Anderson submitted that the Tribunal should disregard the apparent contradiction in the claimant's resignation. It had been written without legal advice and he was unclear as to his legal position. The objective of the prior correspondence had been to assert on the respondent his right to his unpaid salary and the absence of payment had been the true reason that he resigned. Referring to that correspondence he submitted there was no way of knowing whether the claimant was in fact redundant in light of the absence of any response to the emails sent by the claimant.

Decision

Unfair constructive dismissal

45. The first question to determine is whether the claimant was unfairly constructively dismissed.

46. The Tribunal accepts the claimant's evidence that the respondent failed to pay him from September 2018 onwards until his resignation. The respondent's initial and ongoing failure to pay him as well as its subsequent failure to pay him when he eventually made a written request for payment when he believed he could, were in fundamental breach of the claimant's contract, both in respect of its duty to pay him wages and in breach of the implied duty of trust and confidence. It was evident from the claimant's evidence and the documents produced that the respondent had demonstrated a clear intention that it would not pay him the wages he was due.

47. The Tribunal also finds that the claimant resigned in response to those breaches when the respondent ultimately rejected his written demand to be paid his unpaid salary. In all the circumstances this was the last straw and he resigned because of it.

48. Although the respondent had failed to pay the claimant for almost three years the Tribunal was persuaded on balance that in the unique and unusual circumstances prevailing the claimant had never affirmed the contract. In that regard the Tribunal accepted the claimant's evidence that he genuinely believed he could not lawfully be paid and could not lawfully resign during the

currency of the FCA investigation. He was in effect working 'under protest' without pay in these circumstances, under the impression that he would be paid eventually.

5 49. The Tribunal accepts that the claimant took reasonable steps to pursue payment once he believed that it could be lawfully pursued and that in these particular circumstances he did not wait too long before resigning when he tendered his resignation on 22 June 2021.

10 50. The Tribunal therefore finds that the claimant resigned in response to the respondent's fundamental breach of contract and that he was unfairly constructively dismissed.

Wages claim

15 51. The Tribunal finds that the claimant was contractually entitled to be paid his full salary between September 2018 and his resignation on 2 June 2021 and that he was not paid at all during that entire period, during which he performed a significant role for the respondent in relation to the FCA inquiry and at all other times was ready and available to work. The Tribunal accepts that the claimant did not agree to waive or to reduce his salary during the currency of the FCA investigation or at any point afterwards. In the circumstances the Tribunal finds that the respondent made unauthorised deductions from the claimant by its failure to pay him his gross salary of £5,206.27 per month
20 between September 2018 and his resignation on 22 June 2021.

Remedy

Unfair dismissal

25 52. In relation to the claimant's claim for lost wages to the date of the hearing and for future loss as a result of his dismissal, it was clear from his evidence that the respondent is no longer authorised to provide the financial services that he was employed to provide and that the compliance issues he had latterly dealt with are no longer extant. In all the circumstances he would in all likelihood have been made redundant had he not resigned when he did.

53. It was also clear from the claimant's evidence that he had, since the termination of his employment with the respondent, taken no steps to mitigate his loss by attempting to find an alternative job to that which he carried out for the respondent.

5 54. In all the circumstances the Tribunal finds that it is not just and equitable to make any award for loss of earnings.

55. In the circumstances the claimant is due the following payments:-

Basic award –

10 As the claimant was aged 65 at the date of his dismissal he is entitled to a basic award calculated at 30 x his gross weekly pay subject to the statutory maximum applicable of £544 per week. His basic award is therefore £16,320

Compensatory award

15 Loss of statutory rights – Standing the claimant's lengthy service with the respondent and the possibility that he will attempt to find suitable alternative work in the financial sector in which he will need to build up sufficient service to qualify for certain statutory rights, the Tribunal makes an award of £250 for loss of statutory rights.

Unlawful deductions from wages

20 56. As the respondent made unauthorised deductions from the claimant by its failure to pay him any salary between September 2018 and his resignation on 22 June 2021 it must pay him the amount of the deduction, subject to the limit imposed by the Deductions from Wages (Limitation) Regulations 2014 SI 2014/3322, now enacted in section 23 [4A] of the Employment Rights Act
25 1996.

57. By virtue of section 23 [4A] the claimant is entitled to claim for the period of two 2 years prior to the presentation of his complaint on 30 June 2021. As his employment terminated on 22 June 2021 he may only claim from 1 July

2019 until that date. He is therefore owed 23 months ($23 \times \text{£}5,206.27 = \text{£}119,744.21$) and 3 weeks ($3 \times \text{£}1,201.53 = \text{£}3,604.59$) pay, totalling $\text{£}123,348.80$, said sum to be paid gross in order that he will have the liability to account to HMRC to make payments of tax and national insurance thereon.

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Employment Judge: Robert King
Date of Judgment: 31 January 2022
10 Entered in register: 01 February 2022
and copied to parties

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