EMPLOYMENT TRIBUNALS

Claimant: Mr M Bibby

Respondent: Clear Cloud Integration Ltd

Heard at: Manchester **On:** 17 September 2020
30 September 2020 and
10 February 2021
(in Chambers)

Before: Employment Judge Feeney

REPRESENTATION:

Claimant: Mr P Gorasia, Counsel
Respondent: Mr D Northall, Counsel

JUDGMENT

The judgment of the Tribunal is that the claimant's claim of wrongful dismissal/breach of contract succeeds.

REASONS

Introduction

1. The claimant, by a claim form received on 18 November 2019, brought a claim for wrongful dismissal based on constructive dismissal. The claim was for the claimant's notice pay which comprised one month. The claimant said he had resigned because of the respondent's failure to adhere to the terms of his contract, and that they had fundamentally breached an express term of his contract by not providing him with shares in the company. The respondent stated that the clause in the contract was not as straightforward as the claimant stated as it required the claimant to have signed a share agreement, which never occurred; and further and in the alternative the claimant had agreed to receive shares in an alternative company following a partial share buyout.

2. The claimant indicated in his claim form that he intended to pursue a High Court claim for breach of contract, but at the date of the hearing he had not done so. In the circumstances and considering the authorities, as the claimant had not issued proceedings and indicated that he had not completely decided whether to issue High Court proceedings or not, I decided that it was appropriate for me to hear the claimant's claim. The claimant did not seek a postponement of the hearing, he gave evidence as to the fact he had not made any final decision about the High Court and he was in receipt of legal advice therefore I have to conclude he was aware of the ramifications of proceeding.

3. The respondent had raised the issue at the beginning of the hearing as it is well known that where there are High Court proceedings it is inappropriate for the Tribunal to continue to adjudicate on a matter as it could fix the High Court with findings of fact it did not agree with.

4. However, in this case after ten months the claimant had not issued proceedings and in those circumstances, after due consideration, I decided that it was appropriate to go ahead with hearing the case. The bundle had been prepared and all the witnesses were present. The respondent was essential neutral on the matter, stating that the claimant would be fixed with the findings of the Tribunal as would the respondent. In those circumstances it appeared that the disadvantage to the claimant and the respondent would be equal and the respondent would also be able to argue, should the claimant issue High Court proceedings, that that was inappropriate and/or had the claimant lost at Tribunal that he had no reasonable prospect of success at the High Court. It is for the respondent to raise its arguments in the High Court if such a claim is brought.

The Issues

5. The issues for the Tribunal to decide were:

(1) Was the claimant entitled to resign with or without notice in response to a fundamental breach of contract by the respondent?

(2) If so, was the claimant entitled to his notice pay?

(3) If so, what was the notice pay?

(4) Was the respondent in fundamental breach of contract by breaching the express term in the claimant's contract to provide him with shares? So far as the claimant claimed breach of the implied term of trust and confidence, it only related to the breach in respect of the shares. It was clarified at the hearing that the claimant did not rely on a course of conduct by the respondent.

(5) Did the claimant affirm the alleged breach of contract by agreeing to accept shares in an alternative company or by delaying too long before resigning and failing to work under protest?

(6) Was the contract varied by the parties agreeing the claimant would receive shares in the other company?

(7) Was it possible to vary the contract orally or could this only be undertaken in writing?

Witnesses

6. The Tribunal heard from the claimant, Mathew Bibby, and for the respondent from Catherine Greening, Acting Chief Financial Officer and Nicola Frost, Head of Legal at UKFast.Net Limited. There was no evidence from Mr Lawrence Jones the director of the respondent and its 'parent' company.

Findings of Fact

7. The claimant, who was a relatively young man which has some relevance to this case, had worked in IT engineering consultancy for over ten years. He had had his own consultancy business providing IT infrastructure and engineering architecture to clients, but in 2015 he obtained a prestigious role with a large global multinational company (Amazon).

8. Whilst the claimant was with Amazon he was contacted by Lawrence Jones, the CEO and owner of UKFast.Net Limited, who offered him a role as Chief Technology Officer. This offer included a promise of £250,000 worth of shares to be granted with UKFast did the next buyout deal. The claimant turned the offer down as there was a lack of clarity as to when the shares would be granted and he received a better offer from an investment bank. Mr Jones did not give evidence at the Tribunal and accordingly I accept the claimant's recollection of any dealings with Mr Jones. There had been discussion in July and August 2017 during the previous negotiations about the claimant joining about a share scheme, and at one point Mr Jones had sent an email to the claimant:

> "On an exit event these shares will crystalise in the same way L & G shares do (the business owners) and will be allocated amongst the staff in proportion to the units allocated at that time. All share awards will be subject to bad leaver restrictions in the event the employee leaves UKFast before the exit event."

The claimant had not liked the arrangements proposed and had not gone ahead with joining the business.

9. The claimant joined an investment bank in September 2017 but the role did not develop and again the claimant went back to being an independent consultant.

10. In January 2018 he had further discussions with Mr Jones and he was made an offer as Managing Director of a cloud consultancy and managed services business outside of the UKFast Group. The respondent was set up as a vehicle for this business and the claimant was offered a starting salary of £130,000 a year plus a 10% shareholding in the company. The claimant would be building the business from scratch and would have autonomy. The claimant agreed to accept the offer and was persuaded by the share offer and the subsequent agreement of the respondent to increase the salary to £15,000 a year. The claimant's evidence, which I accepted, was that the offer of the 10% shareholding was a key reason why he

accepted the offer on this occasion. In particular the value of that shareholding would be dependent on the claimant's ability to grow the company: he felt this was a great incentive and had a lot of confidence that he could do this. The claimant believed that in five years he would be able to build the business with a turnover of £20million and a projected EBITDA (an acronym for earnings before interest, taxes, depreciation and amortization) of £5million. This would have resulted in a £6million valuation of the shareholding (i.e. equity). The claimant said when he resigned after 18 months the respondent’s business had a turnover of £2million and a targeted EBITDA of 25%. I accept the claimant’s evidence because it was clear he had previously rejected an offer that did not include any shares.

11. The claimant received his contract of employment on 29 January 2018 and signed it on 19 February 2018. The relevant clauses are as follows:

> Paragraph 6 said:
>
> “Your pay is £150,000 per year payable on or around the last day of each month by BACS in arrears.
>
> The company will review your pay annually and advise you in writing of any pay change. There is no automatic entitlement to an annual increase in your pay.
>
> We would also offer you 10% of the current total issued shares in the company subject to you signing appropriate shareholder documentation.”
>
> 14. Notice
>
> “You and the company are required to give the following written notice to terminate your employment…at least one month but less than four years’ continuous service the notice period is four weeks.”
>
> 26. Changes to terms of employment
>
> “The company reserves the right to make reasonable amendments to your terms and conditions of employment. Any changes or amendments to the terms of your employment will be confirmed to you in writing within one month of them taking effect.”

12. On 29 January 2018 Nicola Frost emailed Lawrence Jones, not copied to the claimant, stating that:

> “Dear all
>
> I’ve been thinking through what we need to include in the equity documents if the respondent is part of the UKFast Group. Shareholdings would be UKFast 89%, Sean Redmond 1%, Matt Bibby 10% and:
>
> - We would need to give Sean and Matt a separate class of shares to that we give to UKFast. This is so we could attach leaver provisions to Matt and Sean’s shares.

- Leaver provisions are presumably our best just to replicate per the 2014 UKFast scheme. This means basically they would not keep their shares if they leave and that you can decide if this would be otherwise, so allow them to keep their shares only if they are a good leaver.

- Include a right for UKFast to buy Matt and Sean's shares for a fair value on a change of control in UKFast (any buyer wouldn't want a subsidiary with two small shareholders in it, and I think I would want this.

- Directors to be LJ, GJ and MB (it would mean L & G could outvote him at the Board.

- Right to take part in any offer round of shares if they can fund it pro rata to shareholdings and on the same terms.

- Drag along right if UKFast want to sell their shares in the respondent to a third party unconnected buyer with Matt and Sean having the right to tag along on the same terms, so UKFast could force them to sell.

- Include restrictive covenants to be given to Matt and Sean in capacity as shareholders in the shareholder agreement more likely to be enforceable than in a contract of employment."

13. Catherine Greening replied that that "sounded good":

"If he is well advised or a good businessman we should be prepared for him to add things like:

- UKFast can't compete/take the respondent's customers …

- Only if costs wholly exclusive if necessary for the benefit of the respondent's business are approved …

- Clear price agreement …

For us I do think this is the right answer having the respondent legally in UKFast but for Matt having shares in a subsidiary is a risk most advisers would counsel against so his response will be interesting."

14. On 19 February 2018 Nicola Frost reported: that Mr Bibby was there and:

"…has asked for the documents relating to his shareholding and is keen to know what is proposed… I had done a note to you but with you being away just waiting to hear back. Shall I just show him what's in place for UKFast management and work on the basis it will be replicated in the main part? I expect he will query the position on leaver and on voting/dividends as well."

15. Mr Jones replied, asking Ms Frost to tell the claimant that he and his wife would go through everything when they were back from holiday.

16. Mr Bibby believed he had spoken to Mr Jones in March and he had said approximately, “as you are building it you can have 10% of it” and “you’ve got to trust me, I’m a man of my word”. However, the claimant did not hear anything further and he queried with this with him on a number of occasions.

17. In May the claimant made a more determined effort to sort the matter out with Mr Jones, however he felt he had made no headway and therefore tried to discuss the issue with Nicola Frost. She advised him that a full suite of corporate documentation would be required to grant the CC shares and she would liaise with Mr Jones in relation to that.

18. On 18 May 2018 Ms Frost emailed Mr Jones, obviously unbeknown to the claimant, and stated:

> “Matt mentioned his shares again just now. I said you had said I could crack on with the documents, that it was on the list. He said what was the deal around his shares, and he was expecting dividends and true equity rather than something like the UKFast share scheme.”

19. Ms Frost went on to point out:

> “The UKFast scheme which ND/JB etc are party to is basically something which gives value on an exit and no dividends in the meantime. Can we have a chat about what you want to say on the shares.”

20. This appeared to jump start some progress on the matter, and on 6 June 2018 Nicola Frost sent a draft to the claimant setting out key equity points. This was a series of questions and answers as follows:

(1) What equity is being offered to you in Clear Cloud?

Answer: We are setting aside 10% of the equity in Clear Cloud for you.

(2) Will all the share rights be the same?

Answer: Yes, all shares in Clear Cloud will have equal rights for voting and dividends and capital.

(3) What happens if Clear Cloud needs more money for future acquisitions?

Answer: If Clear Cloud needs to issue fresh shares to fund investments such as bolt on acquisitions all shareholders will have an equal right to subscribe for those new shares. Anyone choosing not to subscribe will have to accept the consequential dilution.

(4) Can you transfer/sell your shares to other people?

Answer: You can only transfer your shares to spouses or family trusts not to third parties.

(5) What happens if you were to leave before we sell Clear Cloud?

Answer: It depends on the circumstances of why you have left and whether you were a good leaver or a bad leaver. If you are a good leaver you would receive market value for your shares when you left and if you are a bad leaver you would get nothing and the shares would come back to your replacement or someone nominated by UKFast.

(6) What is a good leaver?

Answer: You will be designated a good leaver in the following circumstances:

- Death
- Permanent ill health/permanent incapacity
- Unfair dismissal as determined by an Employment Tribunal (and solely for a technical procedural reason)

(7) What is a bad leaver?

Answer: Any circumstance that is not a good leave scenario.

(8) What if UKFast choose to sell its shares in Clear Cloud?

Answer: There will be a drag along and tag along provisions as follows:

- "Drag Long" – If UKFAst decide to sell it would be able to force you to sell at the same time (as a buyer may want 100% or not at all).
- "Tag along" – UKFast can't strike a deal to sell your shares without making sure the buyer offers the same deal to each of you.

21. The claimant replied on 13 June 2018 with some comments. The claimant's comments were:

- On question (3) – he requested explicit pre-emption rights;
- On question (4) – that he could transfer his shares to other family members and to a third party with the consent of the shareholder majority;
- On question (5) – request option for MB to retain shares in good leaver scenario rather than market value payout;
- On question (6) – could the list be extended to redundancy, retirement at 55, after three and five years providing the performance of Clear Cloud has achieved an agreed EBITDA figure;

- On question (7) – request a provision for the shareholder majority to be able to exercise their discretion to declare a bad leaver to be a good leaver if they thought fit.

22. Catherine Greening wrote to Nicola Frost following receipt of this email on 13 June 2018 to say:

> "He's had advice then. Loz (i.e. Lawrence Jones) needs to bat some of these away."

23. The claimant later added one more query on 13 June, stating he requested provision that prevented any "revenue, diversion/shifting into another legal entity owned by UKFast.Net or Lawrence/Gayle which pertains to providing similar services (management/integration activities with AWS/Azure Google/Alibaba) to Clear Cloud Integration Limited customers.

24. Ms Frost contacted Lawrence Jones and stated:

> "Hi, Matt has just come back with this. I will ask Catherine for a time to discuss. The only point of substance is the one about him being able to keep some shares if he is a good leaver and good leaver being extended if Clear Cloud reaches a certain EBITDA figure."

25. Ms Frost also replied to the claimant, saying:

> "We will need a full suite of equity documentation prepared, so yes we would need to draft and agree new articles of association."

26. On 19 October 2018 the claimant emailed Mr Jones as there had been no progress:

> "Hello, I just want to follow up on my 10% shareholding in Clear Cloud Integration Limited. I am concerned that the longer we leave this and the company grows the more likely that my shareholding will be subject to benefit in kind tax as the company will have a value in the eyes of HMRC. Can we lock down the next fortnight for closing this out? Cheers, Matt"

27. Mr Jones replied, saying:

> "No worries, we will try and prioritise this."

28. On 30 November 2018 Mr Jones informed the claimant that he could not grant the shares because of complexities that had arisen in the context of the investment into UKFast Group by a private equity house (Company 'I'). accept that this is what was said by Mr Jones to the claimant. Mr Jones did not give evidence therefore there was no direct challenge to the claimant's version of any conversations not recorded elsewhere.

29. The claimant said:

> "Mr Jones asked me to bear with him and stated he would deliver shares in UKFast of equivalent value to CC shares I had a right to."

30. The claimant took the view that what was being proposed was an alternative to the contractual obligation in the contract and that he had the power to accept or refuse the offer as an alternative to clause 6. If he did not think it was good enough he would resign. However, there was no detail to start making that decision at this stage. On 17 January the claimant raised the issue again, and on 24 January and on 29 January.

31. The deal with "I" completed on 21 December 2018 but nothing subsequently happened.

32. In January 2019 the claimant raised concerns with Catherine Greening and confirmed to her that he intended to resign in February 2019 because of this issue. Mr Jones took the claimant out and advised him everything was held up because of High Court litigation in respect of a different matter and asked him to wait till June when he believed the litigation would be over and he could make him an offer. The claimant agreed.

33. The respondent produced emails showing that there was some activity in respect of the shares between Mr Jones and "I", in respect of what was now called "sweet equity allocation", which was a substitute allocation to top executives with the respondent and UKFast, and in the top executives was included the claimant.

34. The claimant decided to resign on 23 July 2019. He did not mention the shares in his resignation letter as he wanted to keep it as uncontentious as possible. He stated:

> "Please take this as my letter of resignation from my role at Clear Cloud. As per my contract I will be leaving the organisation on 23 August 2019. Thank you for your support to date and do let me know how I can transition the company to embark on its next stage of the journey.
>
> Yours sincerely
>
> Matt Bibby"

35. The claimant went to Mr Jones' office to give him his resignation. He said Mr Jones was quite angry with him, stating "don't be clever, just get out of my office". Mr Jones then rang the claimant five minutes later and asked to meet in one of the meeting rooms on the claimant's floor, which he did do, and there he discussed the issue with Nicola Frost and later Catherine Greening attended. The claimant stated that Mr Jones said:

> "You're in your later 20s, you're making a big mistake. Your life is spiralling, you've put on weight, you need to get to the gym. The shares will get delivered, it's coming, we're waiting on I. It's I who have got it wrong."

36. The claimant was asked to reconsider his resignation and he agreed to do so. The claimant stated that Catherine Greening told him that he was looking at

£3million in UKFast shares with the value of UKFast Group on I's exit was £1.5billion (an exit being a sale). However, it was not clear what amount of shares he would receive if the sale was below £1.5billion. He noticed there was as spreadsheet disclosed in preparation for this hearing, however the claimant said he had never seen this spreadsheet until it was disclosed in these proceedings.

37. Mr Jones emailed the claimant to persuade him to change his mind: he asked the claimant to trust him to deliver. Catherine Greening also confirmed to Mr Jones that she had had a chat with the claimant and had given him indicative numbers. She thought that this had relieved him. However, she pointed out he had tried to compare it to the original deal of the 10% with Clear Cloud, but she thought she had convinced him to move on from that. There was also a suggestion that the claimant speak to a Nolan Hough, which he did indeed do, and Nolan Hough sent an email to Lawrence Jones on 25 July 2019 saying the following:

> "In the conversation he wasn't angry or despondent he just feels he has delivered his side of the deal and would like clarity on UKF side. He feels like his initial offer of 10% Clear Cloud was replaced with the sweet equity pot. He says he has been asking now since February what the number would be which was promised three months ago and then pushed back. I'm not sure if this is true but that's his perception…He simply wants a stake in the business he feels instrumental in building…Give him clarity around this (i.e. a number) would save him."

Again, I did not hear from Mr Hough accordingly his version of what was aid is of limited value.

38. There was also some feedback from Suzie Mitchell, a Business Coach. She said:

> "Matt filled me in, obviously with handing in his notice. As I mentioned in our catch-up last month he was looking for certainty of his long-term agreed financial deal of what was agreed with you. Wherever he works, and it still could be with you, he wants/needs to know that the next 7-10 years that he is building towards a financial fund (equity) for his future and future security. He's 30 years old now and feels now is the time to really dig in and commit to massive results and make a difference…If we can get him more actual tangible equity presented to him I am sure he will stay, thrive and be a huge asset to your company…"

39. The claimant visited Mr Jones on his yacht in early August 2019 and was advised by Mr Jones that the deal regarding the shares/sweet equity was near to completion but there were issues with "I" he said. However, he provided no details, for example how many shares the claimant would get or their value. However, he believed Mr Lawrence Jones' assurances and withdrew his resignation.

40. The claimant waited until the end of September 2019 for everyone to return from holiday, and on 30 September 2019 he resigned with immediate effect by email. He stated:

> "Dear Lawrence
>
> I am wiring to notify you of my decision to resign with immediate effect from my employment as Managing Director of Clear Cloud Integration Limited. As you will be aware, I have been employed as Managing Director since 15 February 2018 under a contract of employment dated 19 February 2018. A copy of the contract is enclosed. I refer to clause 6 of the contract and in particular the following clause:
>
> 'We would also offer you 10% of the current total issued shares in the company subject to you signing appropriate shareholder documentation'.
>
> Notwithstanding the contractual commitment in the contract, the company has failed to issue me with any shares in the company. I believe this is a clear fundamental breach of my contract of employment and I am resigning with immediate effect in response to the company's breach of contract. Accordingly my last day of employment will be today."

41. Ms Greening and Ms Frost gave evidence to the effect that they were both involved in waiting for sweet equity in UKFast.Net and were in the same position as the claimant but they had to wait until all the barriers to obtain the sweet equity had been cleared.

42. Sweet equity is a common incentive used by investors to make sure key management have the opportunity to make a significant amount of money if the investment is a success. Obviously this is also an incentive for them to drive the business forward. It is also common that the shares would have no value until there was a buyout of the company, and there would be a requirement otherwise to sell back the shares for a nominal value. The shares would not therefore be tradeable at any point, nor would a dividend be received on those shares. The arrangement was going to be that Mr and Mrs Jones set aside 5% of their own shares to create a pot from which the key management position holders would be offered a certain amount of shares. Ms Greening said there were draft spreadsheets in circulation and she opined that if the business sold at a valuation of £1billion Mr Bibby could have expected to receive a sum in the region of £1.7million.

43. The respondent's solicitors wrote to the claimant's solicitors on 14 October 2019 and stated as part of that letter:

> "Mr Jones held a discussion with Mr Bibby in an effort to persuade him to rescind his resignation and to remain employed by the company. As part of these discussions Mr Jones impressed upon Mr Bibby the benefits he would be likely to derive in future as a result of the plan to include him in the UKFast sweet equity pot. Mr Bibby agreed to remain employed by the company following these discussions.
>
> Notwithstanding the above, on 30 September 2019 Mr Bibby sent an email to Mr Jones to notify the company of his decision to resign with immediate effect. He alleged the company had acted in fundamental breach of contract as it had 'failed to issue [him] with any shares in the company'. However, and as

> explained above, the reason why the company had not issued Mr Bibby with shares was because it had been discussing with him the possibility of awarding him a far more generous alternative benefit, something which he had accepted in principle. In the event and with his agreement Mr Bibby did not ever sign 'appropriate shareholder documentation' as required by the contract, and he therefore had no entitlement to a 10% sharing of the company."

The Law

44. Although this is a claim for notice pay, it is necessary to consider the Employment Rights Act 1996 in respect of the definition of constructive dismissal as the precepts established apply in common law as well as statute.

45. Section 95(1)(c) and section 136(1) of the 1996 Act apply. In the 1996 Act, of course, constructive dismissal is concerned with defining a form of unfair dismissal. Here we are concerned with defining whether the respondent was in breach of contract entitling the claimant to resign without notice and claim his notice as damages. Any breach of contract by an employer that results in a loss to the employee can attract damages. The claim is brought in the Employment Tribunal under section 6 of the Employment Tribunals Act 1996 and the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

46. The principles were set out in **Western Excavating (ECC) Limited v Sharp [1978]** where Lord Denning said:

> "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 any further performance. If he does so then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively may give notice to say he is leaving at the end of the notice, but the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

47. Although the claimant relied on the express term of his contract at clause 6, there was also put forward in argument that the implied term of trust and confidence was breached by the failure to deliver the shares. The claimant relied on **Malik v BCCI** and also on **Cantor Fitzgerald International v Callaghan & Others [1999]**:

> "Where however an employer unilaterally reduces his employee's pay or diminishes the value of his salary package the entire foundation of the contract of employment is undermined…will normally be regarded as repudiatory."

48. A repudiatory breach can be affirmed or alternatively the employee accepts the repudiation which brings the contract to an end. In **W E Cox Toner (International) Ltd v Crook [1981]** it was said that:

> "If one party (the guilty party) commits a repudiatory breach of contract the other party (the innocent party) can choose one of two courses: he can affirm the contract and insist on its further performance or he can accept the repudiation in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses. If once he affirms the contract his right to accept the repudiation is at an end, but he is not bound to elect within a reasonable or any other time mere delay itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of contract; but if it is prolonged it may be evidence of an implied affirmation."

49. In **Chindove v William Morrisons Supermarket PLC EAT [2013]** it was said that the issue was essentially one of conduct and not of time.

50. It is of course possible for the employee to work under protest, which was also considered in **W E Cox Toner**, where it was said:

> "If the employee further performs the contract to a limited extent but at the same time makes it clear he is reserving his rights to accept the repudiation or is only continuing so as to allow the employer to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation."

51. Affirmation of the contract may be express or implied. It will be implied if:

(1) The innocent party calls on the guilty party for further performance of the contract since their conduct is only consistent with the continued existence of a contractual obligation.

(2) The innocent party themselves acts in a way which is only consistent with the continued existence of a contract – because such acts will normally show affirmation of the contract.

52. **Buckland v Bournemouth University [2010]** Court of Appeal states:

> "Neither can the respondent cure the breach pending the employee's affirmation or repudiation."

But at the same time it also states:

> "A wronged party, particularly if it fails to make its position entirely clear at the outset, cannot ordinarily expect to continue with a contract for very long without losing the option of termination, or at least where the other party has offered to make suitable amends."

53. The claimant also referred to **Force India Formula One Team Limited v Etihad Airways PJSC & others [2010]** Court of Appeal. In that case it was

decided that mere delay could demonstrate a decision to affirm, however such cases would typically occur where time is of the essence. In that case the court took the view the respondents were always in fact considering their position and the claimants knew or must have known that that was the situation.

54. Although the claimant's submissions referred to a general proposition that the respondent's conduct breached the implied term of trust and confidence, at the beginning of the hearing it had been agreed that the issue was whether clause 6 had been breached or not and not whether there had been discussions which were not bona fide.

Incomplete Agreements

55. The respondent referred to the section in **Chitty on Contracts** in reference to incomplete agreements. This states that:

> "Parties may reach agreement on essential matters of principle but leave important points unsettled so that their agreement is incomplete. It has for example been held that there is no contract where an agreement for a lease failed to specify the date on which the term was to commence. Examples include an agreement to transfer money and property conditional on the transferee's retraction of comments in an affidavit and undertaking of confidentiality on the transferor's satisfaction was not intending until the conditions were fulfilled, the conditions being anyway too uncertain. An agreement is also incomplete if it expressly provides that it is subject to specific points. There is no contract in such a case until either those points are resolved or the parties agree that their resolution is no longer necessary for the agreement to enter into contractual form.
>
> A mere lack of detail, however, does not mean that an agreement is incomplete. For example, agreement for the sale of goods may be complete as soon as the parties have agreed to buy and sell where the remaining details can be determined by the standard of reasonableness or by law.
>
> Even failure to agree a price is not necessarily fatal although statutory provisions in such a situation provide that a reasonable sum must be paid. However, an offer to sell a public house with vacant possession for £7,000 was accepted without qualification and it was agreed there was a binding contract been though many important points, for example a date of completion and the question of deposit, were left open. Further, if it is possible to imply something that is so obvious it goes without saying…an incomplete bargain can be a binding one."

56. In **Wells v Devani [2019] Supreme Court** the Supreme Court had to consider whether an oral agreement between a vendor and an estate agent was sufficiently certain to be binding. The estate agent brought proceedings against his client for non payment of commission. Following a telephone call between them the agent had successfully found a purchaser for the client's flats. In that call the parties had agreed that the agent's commission would be 2% plus VAT but the trigger event for payment had not been discussed. The vendor argued that the absence of this

information made the relationship too uncertain for the obligation to pay commission to be binding. The Supreme Court held that as a matter of interpretation commission was payable on completion of the sale. Although interpretation disputes usually turn upon drafting, the context and conduct of the parties could also be relevant. In this case a reasonable person would have understood the parties to have meant for completion to trigger the right to payment with the amount due would be paid out of the proceeds of sale. Therefore the contract was sufficiently certain and complete to be enforceable.

Contract Jurisdiction

57. The tribunal's contract jurisdiction is set out in Employment Tribunals (Extension of Jurisdiction) Order 1994. This limits any claim to £25,000.

Submissions

58. The claimant therefore relied on the failure to meet the terms of clause 6. It was the claimant's submission that following the November meeting when Mr Jones had said he could no longer deliver shares in the respondent, that the claimant was waiting and considering his position subject to the possibility that an alternative proposition might be acceptable, but he had not accepted the proposition that clause 6 was not going to be implemented. Further therefore he had not affirmed the contract neither had it been varied: he relied on the other provision of the contract which stated any variation had to be in writing in any event. However, at no point had he reached an agreement with Mr Jones that he would accept shares in UKFast as substitute for Clear Cloud shares.

59. The respondent's case is that first of all there was no breach of clause 6 because no shareholder agreement was signed. Secondly, that the claimant knew in November he would not be awarded shares in the respondent yet he continued to work without protesting and indeed even reversing his decision to resign in July 2019: that amounted to a waiver of the breach and affirmation of the contract. Further, the claimant's conduct showed that he had agreed to a variation of the contract i.e. Clear Cloud shares being substituted by UKFast shares/sweet equity. Finally, the respondent submitted that the claimant resigned far too long after he had been advised in November 2018 that the shares in the respondent would not be provided.

Conclusions

The meaning of clause 6

60. The respondent suggests that clause 6 was merely an agreement to negotiate further. It did not amount to a complete agreement and in the absence of further agreement there cannot be a breach of contract. This was for two reasons:

(1) Because it was subject to the claimant signing appropriate shareholder documentation, which would require two things:

   (i) negotiation of the terms on which the shares were to be granted, such negotiation as the claimant entered into in July 2019; and

(ii) agreement between the parties, which was not reached in 2018 and was interrupted by the Inflexion deal.

(2) In addition, the word "would" is used rather than "will", which suggests it is conditional on further agreement.

(3) There was no quantifiable date by which the shares were to be allocated.

61. The respondent submitted the Tribunal could not simply imply a deadline based on a reasonable period as it was not necessary to imply such a term: the parties had seen fit not to cater for a deadline in the express contract. Where there is an agreement to negotiate there is no obligation to reach agreement in part because the law recognises that a negotiating party must normally be free to advance his own interests in the negotiation, and such a position was taken in the negotiations in July 2018. However, there was no obligation for the respondent to accede to the claimant's demands, nor vice versa. As it happened an agreement was not reached in July 2018 and therefore the respondent says clause 6 was not completed.

62. My conclusion in respect of clause 6: There was an agreement in principle that 10% of the shares would be paid once the shareholder agreement had been signed. I agree with the respondent submission to some extent. This did require some negotiation and it would, normally, require compromise on both sides. This process had started but it had not completed through no fault of the claimant, however. The trigger event would have been the signing of the shareholder agreement. However, this did not occur. There was nothing unusual in the way the shareholder contract was negotiated: the claimant expected a bit too much on some issues and on others – such as expanding the good leaver scenario- was what would be expected. Likewise, insofar as negotiations took place the respondent was seeking to protect its position, essentially in the interests of the business. The negotiations fizzled out and the claimant took some time to chase them up by which time things had changed.

63. Unfortunately, the claimant agreed to a clause which was not helpful to his position. Perhaps there should have been an end date for the shareholders agreement, best of all that the shareholder agreement was agreed and drafted and signed at the same time as the employment contract. However, that was not what clause 6 said . I was not asked to imply anything specific into clause 6.

64. I have considered whether it was an incomplete agreement and whether the part that is "missing" can be inserted, albeit the claimant did not put anything forward. However, this is not a **Devani** situation. In **Devani** it would be obvious anyone who had ever bought a house that commission would be payable on completion.

65. I cannot accept the claimant's proposition that signing was a mere physical act: if that was the case the claimants would have been obliged to sign anything the respondent drafted. He did not do this when the terms where initially put to him and no-one would have been surprised that he did not; negotiation would have been

expected. However, this would have been the only way of reaching the end point envisaged by clause 6 in a timely fashion.

66. Finally, I considered whether the respondent's failure to continue with the shareholder agreement negotiation is in effect a breach of clause 6 as quite clearly Mr Jones told the claimant he could not honour the agreement in any event even if they agreed terms, even if the claimant signed a shareholder agreement, due to the situation with Company I. Clause 6 has to be predicated on the respondent facilitating a shareholder agreement being signed, even if it refused to negotiate the terms. The emails from behind the scenes showed that it was intending to negotiate until its hands were tied by the deal with Company I.

67. Accordingly, I find that clause 6 was breached as by 30 November the respondent indicated it could not comply with clause 6 at all, not even in circumstances whereby they gave the claimant a highly prejudicial agreement and he signed it. This was clearly a fundamental breach, it was a very important of the contract, potentially worth a considerable (life changing) amount of money and was so particularly to the claimant who I accept would not have been persuaded to take the role without it.

Affirmation of Contract

68. In respect of affirmation of contract, the respondent states that there were two points where affirmation was clear:

(1) The claimant continuing in his employment without protest following the conversation with Mr Jones in or around 30 November;

(2) When the claimant retracted his resignation on 26 July 2019.

69. However, I accept the claimant's submission that there was no affirmation and that he was entitled to consider the respondent's proposal regarding a substitute for the original agreement for a period of time. Whilst this was a considerable period of time in the scheme of a normal unfair constructive dismissal claim, in the matter of company start-ups, acquisitions and investments I do not find that the claimant waiting for matters to become clear was too long.

70. I have considered the fact that the claimant retracted his resignation at a point when he knew that the 10% offer of equity in the respondent company was no longer on the table. This was established by the evidence of Catherine Greening, the email of and the claimant's own evidence at paragraph 19. Further, the claimant did not simply carry on working but actually reversed the decision to resign. However, the case law establishes that he was entitled to consider the remedy the respondent was offering and he relied on Mr Jones's supplications to give him time to work it out. He could not be expected to agree it until it was a firm and detailed proposal.

Variation

71. The respondent says that in respect of variation, the claimant knew from November 2018 that there was no possibility of obtaining the 10% shares. He did not protest but continued in his employment, and by his conduct he agreed to

substitution of the original incentive with that proposed by Mr Jones. There was adequate consideration in that he relinquished a claim to the original proposal and the respondent made a revised proposal in return. From that point onwards, it was no longer a contractual obligation (clause 6). However, I find that the claimant's employment contract could not be varied except in writing as agreed in the express terms of his contract, and therefore there was no variation. There is no specific variation in writing and a unilateral variation would have been unreasonable but even so there was no unilateral variation.

Delay

72. In respect of delay, the respondent submitted that the claimant delayed ten months before resigning. In that time he continued working without protest, therefore if there was a breach of contract by not accepting the repudiation the claimant must be regarded as having been deprived of the opportunity of accepting the repudiation. It is not clear what the claimant was waiting for as he knew he would not get the shares in the respondent.

73. This is a similar point to affirmation and I rely on my findings in respect of affirmation. Further he chased the respondent, he resigned twice he gave them the benefit of the doubt whilst waiting to asses any specific offer. Accordingly, I do not find he lost his right to accept the respondent's breach of contract.

Conclusion

74. Accordingly, the claimant's claim succeeds and the matter will be listed for remedy.

Employment Judge Feeney
Date: 24 February 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
1 March 2021

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