



THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

Mr J M Barrera Beltri

AND

Leit Work Limited

Heard at: London Central

On: 1-2 March 2017

Before: Employment Judge Lewzey

Members: Mr R Pell
Ms H Szumowska

Representation

Claimant: In Person
Respondent: Mr G Self, Counsel

JUDGMENT having been sent to the parties on 3 March 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant Mr J M Barrera Beltri worked for the Respondent as an architect for three weeks from 22 June to 12 July 2016. He presented his Claim Form to the Employment Tribunal on 10 October 2016 claiming automatic unfair dismissal and detriment for making protected disclosures, pursuant respectively to Sections 103A and 47B of the Employment Rights Act 1996.

Issues

2. The issues for determination by the Tribunal are as follows:

Automatic Unfair Dismissal

2.1 Was the Claimant an employee of the Respondent?

2.2 Did the Claimant make a “qualifying disclosure”, pursuant to section 43B Employment Rights Act 1996, when he sent an email to the Architects Registration Board on 8 July 2016, regarding Ms Thais Lara (consultant of the Respondent) holding herself out to be an architect?

2.2.1 Was there a disclosure of information?

2.2.2 did the subject matter of the disclosure relate to:

- 2.2.2.1 Criminal offences;
- 2.2.2.2 Breach of any legal obligation;
- 2.2.2.3 Miscarriages of justice;
- 2.2.2.4 Danger to the health and safety of any individual;
- 2.2.2.5 Damage to the environment; or
- 2.2.2.6 The deliberate concealing of information about any of the above?

2.2.3 Did the Claimant have a reasonable belief that the information tended to show one of the relevant failure is in paragraph 2.2.2?

2.3 Was the Claimant’s disclosure “protected” pursuant to sections 43C – 43H Employment Rights Act 1996?

2.3.1 Does the Claimant’s disclosure to the Architects Registration Board constitute a “wider disclosure” pursuant to section 43G Employment Rights Act 1996?

2.3.2 If it does

2.3.2.1 Did the Claimant reasonably believe that the information disclosed, and any allegation contained in it, was substantially true?

2.3.2.2 Did the Claimant make the disclosure for personal gain?

2.3.2.3 Did the Claimant:

2.3.2.3.1 Previously disclosed substantially the same information to the Respondent or a prescribed person?

2.3.2.3.2 Reasonably believe, at the time of the disclosure, that he would be subjected to a detriment by his employer if he made the disclosure to the Respondent or a prescribed person? Or

2.3.2.3.3 Reasonably believe (where there is no prescribed person) that material evidence would be concealed or destroyed if the disclosure was made to the Respondent?

- 2.3.2.4 Was it reasonable in all the circumstances for the Claimant to make the disclosure to the Architects Registration Board, pursuant to section 43G Employment Rights Act 1996?
- 2.3.3 Was the alleged failure, which formed the basis of the Claimant's disclosure of "an exceptionally serious" nature pursuant to section 43H Employment Rights Act 1996?
- 2.3.4 If it was:
- 2.3.4.1 Did the Claimant reasonably believe that the information disclosed, and any allegation contained in it, was substantially true? Did the Claimant reasonably believe
- 2.3.4.2 Did the Claimant make the disclosure for personal gain?
- 2.3.4.3 Was it reasonable in all the circumstances for the Claimant to make the disclosure to the Architects Registration Board, taking into account the identity to whom the disclosure was made?
- 2.4 Was the reason or principal reason for the Claimant's dismissal because he made a "protected disclosure"?
- 2.5 If the Claimant is successful in his automatic unfair dismissal claim what compensation should be awarded, taking into account the following:
- 2.5.1 were the Projects likely to have lasted two years?
- 2.5.2 Should any deduction be made pursuant to the case of *Polkey v AE Dayton Services Ltd [1987] ICR 142*?
- 2.5.3 Should any deduction be made by reason of the Claimants contributory fault?
- 2.6 If the Claimant is successful in his automatic unfair dismissal claim, should an order for reinstatement be made?

Detriment

- 2.7.1 Was the Claimant a "worker" of the Respondent?
- 2.7.2 Paragraphs 2.2 and 2.3 of this list of issues are repeated.
- 2.7.3 Was the Claimant subjected to a detriment by the Respondent?
- 2.7.4 What was the detriment to which the claimant was subjected by the Respondent? The Claimant says this relates to demeaning comments and general negative attitude.
- 2.7.5 Was the Claimant subjected to a detriment by the Respondent on the ground that he made a "protected disclosure"?

2.7.6 If the Claimant is successful in his detriment claim what compensation should be awarded taking into account the following:

- 2.7.6.1 Were the Projects likely to have lasted two years?
- 2.7.6.2 Should any deduction be made pursuant to the case of *Polkey v AE Dayton Services Ltd [1987] ICR 142*?
- 2.7.6.3 Should any deduction be made by reason of the Claimant's contributory fault?

Evidence

3. We have heard evidence from Mr Barrera Beltri by means of a written witness statement and on behalf of the Respondent from Mr H Rothe, the Managing Director of the Respondent who also had a written witness statement. In addition, we have an agreed bundle of documents to which we refer by reference to the relevant page number.

The Material Facts

4. Mr Barrera Beltri is a Chartered Architect and member of the RIBA since 25 January 2011. He is registered on the Architects Registration Board ("ARB"). He also has a PGCE and has been teaching maths.

5. The Respondent is an international architectural company. It comprises Mr Rothe the Managing Director, with one employee. Mr Rothe engages individuals for specific projects.

6. In June 2016, Mr Rothe contacted Austin HR Consulting to engage a self employed consulting architect to work on two specific projects with the Respondent's client, Jet Investments Limited, at Hawthorne Row and Tanner House. We have a copy of an email dated 6 June 2016 (30A) from Mr Rothe to Austin in which he says

"What we would need at the moment is an experienced person in residential redevelopment and redesign focus, taking on responsibilities for the project as architectural leader supported by a Part 1 staff and part time architect as contractual advisor in the studio. Ideally 3 month contract for now to be extended for s6 for ongoing projects, one to two site visits per month in Leatherhead."

7. Mr Barrera Beltri was interviewed on 16 June 2016. Mr Rothe sent Austin an email (33) in which he said:

"We would be interested in a 15 days per month arrangement with Joan on the basis of £175.00 per day.

8. Mr Barrera Beltri agreed to £175.00 per day and 15 days per month. He agreed in cross-examination that Mr Rothe could terminate his engagement at any time for any reason. We note that (35) it is suggested that Mr Barrera Beltri had been working as a

teacher at £125.00 per day. Mr Barrera Beltri told us that he was available because the students were doing exams from the June period.

9. The engagement started on 22 June 2016. There was no written contract. There was flexibility as to which days of the week were worked. Initially Mr Barrera Beltri used his own laptop, but was then provided with a computer. The Respondent paid expenses of travelling to the various sites.

10. We note that Mr Barrera Beltri sent an email to Austin on 29 June (47) stating:

“I am very well here and working hard we agreed I would work 15 days per month, but it is up to me when to attend. This week I might work 4 days because I am going to Spain on the 20th until the 29th. In the beginning we said I would work Wednesday to Friday but this week I started on Monday. It is flexible”.

11. At the material time those working at the Respondent were Mr Barrera Beltri, Ms Z Umer, an architectural assistant and Ms T Lara who was a qualified architect who was not registered with the ARB and had not been since 2010. They were working on the projects with Mr Rothe.

12. On 3 July 2016 Mr Barrera Beltri submitted an invoice (57) for £1,225.00 for 7 days work at £175.00 a day. The invoice states:

“I agree to pay my own taxes and national insurance”.

After extensive questioning by the Tribunal as to Mr Barrera Beltri’s tax position with the HMRC, that position remains unclear.

13. On 5 July 2016 a pre-planning meeting had been arranged in relation to the projects with Mole Valley Council at their Offices. This was attended by Mr Rothe, Ms Umer and Council officers and representatives of the developer.

14. Mr Barrera Beltri says that there was a breakfast meeting and a meeting in the car park after the meeting with the Council. He says that he told Mr Rothe that Ms Lara was not registered with the ARB. Mr Rothe denies this. Mr Barrera Beltri’s evidence is unclear. He referred to the breakfast meeting as being with the developer and also to a separate meeting in the car park afterwards, at which he says he asked for the whistleblowing policy. These matters are not pleaded, Mr Rothe denies them. Mr Barrera Beltri does not say in his witness statement when he told Mr Rothe about Ms Lara, although there is general reference at paragraph 64.

15. We accept that it is likely that there was a meeting with the developers before the meeting with the Council. It is unlikely that a complaint about Ms Lara’s registration would be made in front of the client. At the meeting with the Council, issues were raised in relating to the projects which had not been built in accordance with the planning permission and the possibility of demolitions raised. Mr Barrera Beltri has told us at length why demolition was a bad idea, but the issue of whether the premises should be demolished is not relevant to the issues before us. We have evidence that the client was devastated. In an email of 6 July 2016 (59) the local authority said that they were waiting for the team manager to return and would discuss the matter.

16. Mr Rothe told us the building is still there. The argument put forward by Mr Barrera Beltri that Mr Rothe ignored him when he said that Ms Lara was unregistered is not credible. On the evidence before us we find that Mr Barrera Beltri did not mention Ms Lara's registration on 5 July. Mr Barrera Beltri's evidence is that between Tuesday 5 and Friday 9 July, he did not work on these matters.

17. On 8 July 2016 (70) Mr Barrera Beltri emailed the ARB as follows:

"I am sending this email because at work there is a person called Thais Lara who is sending emails as Project Architect.
Please find the forwarded email as evidence of this and send it to professional standards."

Mr Barrera Beltri's evidence is that if he reported Ms Lara to the ARB, he expected Mr Rothe to keep working with him. What Mr Barrera Beltri wanted was for Mr Rothe to work with him to save the building, and he thought that if he reported Ms Lara she would be dismissed and Mr Rothe would continue to work with him.

18. Mr Rothe was told by the developer after the meeting with the Council not to develop the designs any further and therefore there was no further work to do on the project. There is an email dated 10 July to Mr Barrera Beltri and others which makes no mention of the report concerning Ms Lara (73 – 74).

19. On 12 July 2016 (82) Mr Rothe sent an email timed at 0.58.58 to Mr Barrera Beltri as follows:

"Following the last weeks pre-planning meeting it became clear that we are in a position depending on planner's decision whether the project is going to be continued or if planning will apply enforcement.
Therefore, it is decided to put all works in the project on hold for as long as a decision has been made by planners.
I have informed Neelaim Owen of Austin HR that we will not be in a position to continue your involvement at Leit-Werk at this point beyond Tuesday 12 July. This is sad but unavoidable.
.....
Please send me an invoice for your work including Tuesday".

20. By an email of the same date, 12 July 2016 at 06.51 am (83), Mr Barrera Beltri responded:

"I understand that we have to wait for this. It would be nice if we knew about this before my return because I would have stayed in Spain. But you never know".

Mr Barrera Beltri then sent a series of further emails on 12 July to Mr Rothe. It is notable that in the first email set out above makes no mention of Ms Lara or of any whistleblowing. The next email is timed at 06.53 (84) and that merely relates to the documents for planning. There is then a further email at 08.29 (85), which is a complaint about Ms Umer. A further email (86) timed at 08.31 is in substantially the same form complaining about Ms Umer although the final paragraph differs. At 08.45 (87) there is further comment about Mr Barrera Beltri's position and complaints about the civil engineer, a reference to Mr Karsten Weise who worked for the structural engineer. The structural engineers are an entirely separate professional organisation from the Respondent. At 08.57, Mr Barrera Beltri sent a further email (88) in which he says:

“Thais Lara made me believe that she is an architect in Catalunya and in England. I am an architect in Catalonia and England. As everything were words I am not going to do anything with regards to Catalonia, but I found evidence that she was signing emails as a Project Architect. I reported this to ARB and raised the issue to Professional Standards.

.....

You will let me know when I am back at work with the conditions of Architect (correct salary). Until then I will invoice monthly at 175.00 pound per day as agreed.”

A further email was sent at 13.58 with an invoice which was subsequently replaced with another because of an erroneous postcode. At 15.17 (91) Mr Barrera Beltri emailed Austin saying:

“Henrik Rothe has breached contract with me. I would like to know if you have some evidence for how long would the contract run as the only evidence I have got is that he contracted me 15 days per month at £175.00 a day.

At 4.29 pm Mr Barrera Beltri sent a further email (92), this time to the ARB, complaining about Mr Rothe and at 17.11 (94) he sent a further email to Mr Neelaim Owen at Austin saying:

“I determine that this breach of contract can be assessed and evaluated as follows: I should receive the agreed salary until two buildings are completed and ready to sell”.

21. On 12 July 2016 (111A) Ms Lara was contacted by the ARB. She responded immediately (108) and on 14 July (107) the ARB accepted her explanation and said the matter was closed. Mr Barrera Beltri has told us that his view was that if he reported Ms Lara she would be unable to work in the UK. He said that when he told Mr Rothe he expected Mr Rothe to dismiss Ms Lara and bring him back to work. That evidence suggests that Mr Barrera Beltri told Mr Rothe about Ms Lara after his dismissal on 12 July. When put to Mr Barrera Beltri that this was the first time he raised the matter after the dismissal he mentioned a call but did not give further details and then said it was on a Sunday when he raised insurance matters and did not mention Ms Lara. We find Mr Barrera Beltri’s evidence equivocal.

Submissions

22. We have written skeleton arguments from both parties which we have taken fully into account.

Conclusions

23. The first matter is whether Mr Barrera Beltri was an employee of the Respondent. He was engaged at £175.00 per day for 15 days per month. He agreed in cross-examination that his engagement could be terminated at any time for any reason by Mr Rothe. He also told us that he did not expect to be paid holiday pay. There was flexibility as to when he worked because he hoped to get other work, either in teaching or in architecture. Initially he used his own laptop and software, he was not paid on a PAYE basis. He invoiced the Respondent and the invoices stated that he was responsible for his own tax and national insurance. There was also no induction and no written contract. Mr Barrera Beltri’s evidence concerning HMRC is unclear, he

said that he was registered, but he also said he had no idea if he was registered as self employed. He agreed that paying his own tax was an indicator of self employment.

24. Mr Barrera Beltri said that the RIBA had told him that he was self employed because he was not liable for insurance. He has mentioned insurance on a number of occasions during the course of this hearing. Mr Rothe had to carry professional indemnity cover to cover the activities of those working at the Respondent. Indeed, Mr Barrera Beltri says in his own closing skeleton argument that those carrying out a project should hold the insurance. It was the Respondent who carried out the project.

25. Having considered all the evidence, we are not satisfied that there was sufficient mutuality of obligation, for Mr Barrera Beltri to be an employee working under a contract of employment under Section 230 of the Employment Rights Act. He was, however, a worker. In those circumstances, there is no jurisdiction to consider his claim of automatic unfair dismissal, although we may consider his detriment claim. However, in case we are wrong we determine the automatic unfair dismissal claim in any event.

26. The first issue is whether Mr Barrera Beltri made a qualifying disclosure under Section 43B. The Respondent concedes that the email (70-71) to the ARB did amount to a disclosure of information and that Mr Barrera Beltri did have a reasonable belief that the information tended to show that a criminal offence either had been committed or was being committed and/or that a person had failed to comply with the legal obligations to which they had been subject. This does therefore fall within a disclosure qualifying for protection under Section 43B (1)(a) and (b) Employment Rights Act 1996.

27. The second issue is whether the disclosure was made in the public interest. Mr Barrera Beltri's evidence is that he reported Ms Lara so she would get into trouble with Mr Rothe, would not be able to work in the UK and he would get his job back. By his own admission that disclosure was to serve himself. It was entirely self-serving in his own interests and therefore cannot be in the public interest and cannot amount to a qualifying disclosure. In those circumstances the claims both of automatic unfair dismissal and for detriment must fail.

28. However, we determine the other issues. The ARB is not a prescribed person, it is not listed in the Schedule to the Public Interest Disclosure (Prescribed Persons) Order 2014. For that reason, the disclosure to the ARB on 8 July 2016 cannot amount to a protected disclosure.

29. We then come to the email of 12 July 2016 to Mr Rothe. This email was sent after the dismissal and after any alleged treatment which, on the unclear evidence we have before us, seems to relate to Mr Barrera Beltri's view that the building should not be demolished. All of the alleged protected disclosures were raised after the contract came to an end. A protected disclosure cannot influence something that took place before the date of the protected disclosure. In these circumstances the claims of automatic unfair dismissal and detriment for making protected disclosures fail at every level.

Costs

30. We note that the Respondent has made an application for costs at paragraph 41 of the written submissions. The Tribunal does have power to make a costs order under Rule 76 Employment Tribunals Rules of Procedure 2013. Rule 76 (1)(a) and (b) provide:

“A Tribunal may make a costs order , and shall consider whether to do so, where it considers that-

- (a) a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way in which they had been conducted; or
- (b) any claim or response has no reasonable prospect of success;

31. Since this claim is entirely misconceived, the Tribunal must consider the question of costs and has a discretion whether to make an award of costs. In relation to the issue of whether we should exercise our discretion, and, if so, in what amount we heard from Mr Barrera Beltri because Rule 84 provides that in deciding whether to make a costs order and if so in what amount, the Tribunal may have regard to the paying party's ability to pay.

32. This is a case where we may exercise our discretion to award costs so the issue is whether we should exercise that discretion and, if so, in what amount. This whole case has been built by Mr Barrera Beltri on a concern that the building should not be demolished. That is totally irrelevant to the issues before this Tribunal. The reporting of Ms Lara was a matter of self-interest to Mr Barrera Beltri and the temperature of the emails sent by him on 12 July 2016 rose as the day progressed. We take into account that Mr Barrera Beltri is not earning large sums, but there is evidence that his emails of 12 July were intemperate and acting in his own self interest. In these circumstances, we do exercise our discretion to award costs.

33. The issue is therefore how much should be awarded. The total on the Respondent's schedule of costs is £13,033.80 made up of roughly £9,000 solicitor's costs and £3,000 for Counsel's fees. It is not our function to tax these costs. Counsel's fees, on the basis of our experience, are reasonable. We have taken into account that Mr Barrera Beltri earns £597.00 per week gross, which we approximate to £478.00 per week net, for 195 days work per year. It is of course open to him to take other work in the days for which he is not paid. Having taken all these matters into account, it is our unanimous decision that we should award costs payable by the claimant in the sum of £6,000.00.

Employment Judge Lewzey
14 March 2017