



EMPLOYMENT TRIBUNALS

Claimant
Mr K Needs

v

Respondent
Sutton Mattocks and Co LLP

Heard at: London Central Employment Tribunal

On: 12 April 2017

Before: Employment Judge JL Wade

Appearances

For the Claimant: In person

For the Respondent: Mr S Livingstone (Counsel)

RESERVED JUDGMENT

1. The judgment of the Tribunal is that:
 - 1.1 The respondent acted unlawfully in breach of contract and
 - 1.2 it is ordered to pay the claimant damages of one week's net pay.

REASONS

1. The claimant, Mr Keith Needs, is a solicitor. He brings a claim for wrongful dismissal on the basis that he was contracted to work for the respondent as a locum solicitor on a one year fixed term contract which was terminated before he started work.

The facts

2. The respondent, a firm of solicitors, was told by one of its litigators that she would be taking maternity leave from approximately 16 August 2016 and that she planned to take the full year. Maternity cover was needed.

3. On or around 11th May 2016 the respondent engaged the agency Badenoch and Clark (B&C) to recruit a “one-year maternity leave cover”. Thereafter the email discussions used email headings like “maternity cover role” and there was no discussion about the nature of the fixed term.

4. Whilst it is clear that the respondent was seeking to recruit somebody who would be available for the whole of the maternity leave, the documents do not support a conclusion that it expected to commit, as a matter of contract, to a precise term which could not be terminated in the interim. As is well-known, a woman taking maternity leave is entitled to take up to a year but she can return early at any time having given the appropriate notice. She can also return some weeks after her maternity leave has ended if she adds her accrued holiday on at the end. Mr Hook, the practice manager, said in evidence that the firm had recruited maternity locums in the past and had experience that it was hard to predict the exact date of a return to work so, without explicit evidence, it is not possible to conclude that the firm intended to offer the extraordinary guarantee of a year’s pay from the start of the employment.

5. Mr Hook had decided that the maternity cover solicitor needed to be “on the payroll” because they had had some bad experiences with locums letting them down at the last minute and they wanted to avoid this. They felt that engaging a locum on an employment contract direct with the firm rather than as a self-employed contractor would bond them more closely to the firm. This was discussed and on 30th of June Edward Lengthorn from B&C emailed Mr Hook saying:

“as for Keith, he has asked what your holiday entitlement would be as he would be in a contract with yourself and on your payroll for the role”.

Mr Hook says he had made it clear that the claimant would be entering into a written contract with the respondent but the claimant was not sent a draft and the discussions, always via B&C, were not said to be “subject to contract”.

6. After some discussions about the number of days he was going to work, the pay that he would receive and his start date, as well as discussions with other possible locums, the respondent decided to “go with Keith” subject to a telephone interview with the solicitor who he would be covering for. They duly spoke and she confirmed that she wanted to take the full year which was reassuring for the claimant as he would be leaving another assignment to take up this one.

7. She emailed Mr Hook saying that she was broadly happy with the claimant but that he could start not on 16 August when she was due to go on maternity leave but in the second week of September. This meant that if she was off for the year as intended the claimant would only be covering for 11 months. She also said:

“Re references he did not give me any specific names but said we could contact any of the places he has locumed.... May be worth speaking with the most recent (once he has spoken with them).”

However, there is no sign that the respondent actually took up references.

8. On 10 August an exchange between Mr Hook and B&C records further discussion about the claimant going onto the payroll.

Mr Lengthorn: "... *When you get the chance please can you get back to me with the details of the wider benefits that will come with Keith being on your payroll*".

Mr Hook: "*The only benefit we offer will be holiday which will be based on 25 days annual leave pro rata over the number of days and months*".

9. This was important because:

9.1 The claimant told me that he usually works as a self-employed locum so this arrangement was notable and different for him and therefore memorable. He was mindful of the fact that he was going to be on the payroll but whilst that could be synonymous with signing a contract the respondent took no steps to provide a draft. There was never in fact an indication of what further action the respondent planned to take, if any.

9.2 Had Mr Hook, on behalf of the respondent, planned that the claimant was to be working for a fixed term without a break clause he would have known exactly how much holiday to offer rather than stating that it was to be pro rata.

10. The claimant says that the contract was concluded on 11 August. On that day B&C emailed Mr Hook to say:

"Great news, Keith is happy to accept. Please let me know when you are free to speak. There are a few things I need to go through with you".

The respondent says that this shows that the position was still conditional but we do not know what the "few things" were and whether they were connected to the claimant's employment. For example, they could have been connected to the fee that the agency was going to charge the respondent.

11. On 16 August B&C sent Mr Hook details of the assignment and said "*I will begin processing everything on our side*". Again, the respondent says that this shows that the offer was still conditional.

12. Again on 16 August, B&C emailed the claimant (not copying in the respondent) and said;

"I am happy to confirm that [the respondent] are fine with you starting on the week commencing 12 September. You will shortly begin receiving documents from our compliance team however I thought I would still email to confirm the booking. Salary £40,000 (pro rata of 4 days a week at £50,000)..... Upon arrival, the Chiswick office manager will assist in getting you started. Congratulations on obtaining this position."

The respondent says that on 16 August B&C were clear both that paperwork needed to be processed and that their compliance department would be in touch with the claimant which demonstrated that the offer was still conditional. There was however no specific mention of the contract or of conditionality on the part of the respondent. If B&C had paperwork to complete this was not material to the question of whether the respondent had made a contract with the claimant through their recruitment agent.

13. After 16 August B&C did not provide any of paperwork that they were said to be "processing" to the parties and Mr Hook says that because he did not receive the final

paperwork from B&C he did not issue a contract. Whatever the reason, no draft contract was ever supplied and Mr Hook made no attempt to contact the claimant direct to negotiate any other terms.

14. Sadly, after further discussion the respondent decided that it did not actually need an expensive locum for four days a week, preferring to stick with the locum who was covering the first month's maternity leave for two days a week.

15. Through no fault of the claimant's, the respondent contacted B&C to say that the claimant was no longer required. On 1 September Mr Lengthorn from B&C emailed the claimant to say:

"they have come back to me and said they will now not be requiring your services. This is due to the fact that they believe there is only work there for someone to cover on a two day a week basis.... I am beyond embarrassed and extremely annoyed and angry (which is putting it lightly) about how this whole process has been handled and can only apologise on my behalf".

16. The claimant arrived at the respondent's office on 12 September. He says that he had been in Spain until 10 September without internet access and then home for two days without checking messages or emails so he simply arrived as planned. He says that at his age (63) he is not surgically attached to his emails.

17. He says that consideration for the offer, which he had accepted, was his future salary or that he gave up his other more lucrative locum role in order to move to the respondent firm. He had also put down a deposit on a flat in London and arranged to move to west London.

18. The respondent says that the claimant must have seen the email of 1 September and probably turned up at their offices to make a show of the fact that he felt badly done by but I make no finding of fact as the claimant's case is that the contract was concluded on 11 August. The respondent has apologised for its change of mind and says that each side was badly served by B&C.

19. On 7 September B&C invoiced the respondent with its fee saying:

"As per our terms you engaged us to work on the fixed term contract maternity cover and asked us to put an offer to Keith Needs for an 11-month fixed term contract, to start with you on 12 September, which we did and he accepted"

Thus their understanding was that they had secured a long-term booking for their clients.

Conclusions

20. Whilst there was undoubtedly an expectation on both sides as at 11 August that Mr Needs would be with the respondent for a fixed period, I conclude there was no agreed fixed term of a year without a break clause because:

- a. Maternity leave is never predictable in length and so any discussion about length of service could not be precise;
- b. An experienced employer, as this one is, would want to be able to terminate for poor performance so a break clause with reasonable notice would be inserted if the contract was expressed to be for a fixed term;
- c. The claimant was only available for eleven months anyway;

- d. Mr Needs could of course not be bound into working for the respondent for a set time; and
- e. The documents do not demonstrate that the parties intended a fixed term which was not terminable within a year, in fact the documents are silent on the subject of termination generally;
- f. Had the claimant wanted to secure this usual level of commitment from the respondent as a condition of his starting work he could have raised it in the negotiations but he did not do so
- g. The claimant was told that the respondent would pay holiday to the days and months worked and did not query this.

21. I do, however, conclude that the essential elements of a contract were present as at 11th August because:

- a. There was an offer of employment which was accepted and the consideration was to be future salary;
- b. There was no conditionality as to these key terms making up a contract;
- c. Negotiations were never expressed to be subject to contract and were apparently a negotiation between the two sides via their agent which came to a successful conclusion;
- d. Such conditionality as there was after 11 August appears to have been between the respondent and B&C or B&C and the claimant but not between the two contracting parties;
- e. The respondent had the opportunity to supply the claimant with a draft contract and explain that the arrangements were subject to contract but they did not do so even though there was plenty of time after 11 August to organise this;
- f. The claimant was to be "going on the payroll" but this was after the respondent had made the contract through its agent to the satisfaction of all concerned;
- g. It was not inevitable that a written contract was ever going to follow because terms had been agreed through the agency;
- h. There were some conditions along the way which appear to have been waived, such as the taking up of references which was not done.

22. Since there was no written contract I must decide what reasonable a notice period would be. The respondent showed me its standard contract with a probationary period with notice of seven days. After that the notice period was one month. It is inappropriate to read a probationary period into this contract because the claimant was expected to hit the ground running as a maternity locum. I therefore conclude that the reasonable notice period would be one month.

23. The notice period runs from the date notice was given which was 1 September. Of course there was no loss until 12 September when the claimant was due to start work and be paid. He mitigated his loss from 19 September at a firm called Rradar Ltd. and so is only entitled to compensation of one week's net pay.

24. I am sorry that the compensation awarded is so small because I agree with the claimant that he was badly done by, although quite who by is hard to tell in that the circumstances here were so unusual that everyone was caught by surprise.

25. I have made an award of one week's net pay based on my understanding of the Schedule of Loss but should a remedy hearing be needed the parties may apply.

Employment Judge Wade
19 April 2017