

EMPLOYMENT APPEAL TRIBUNAL
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 15 October 2014

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

TEMPLETON THORP LTD

APPELLANT

MR C A GILBERT

RESPONDENT

Transcript of Proceedings

JUDGMENT

Revised

APPEARANCES

For the Appellant

MR EDWARD KEMP
(of Counsel)
Public Direct Access Scheme

For the Respondent

MR CHRIS GILBERT
(The Respondent in Person)

SUMMARY

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

CONTRACT OF EMPLOYMENT - Damages for breach of contract

The Respondent counterclaimed for damages for breach of contract of employment under Article 4 **Extension of Jurisdiction Order 1994**. The Employment Judge found no loss. On Rule 3(10) Appellant Only Hearing, appeal permitted to proceed on a new measure of damages. The Respondent (Claimant below) objected to new point being taken. Objection upheld. Appeal dismissed.

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding in the London (Central) Employment Tribunal. The parties are Mr Gilbert, Claimant, and Templeton Thorp Ltd, Respondent. It is now an old case, as Mr Gilbert gently observed during this hearing. The Claimant was employed by the Respondent as Director of Business Development under the terms of a written contract of employment dated 30 August 2007 (“the contract”). His employment was terminated by the Respondent by one month’s notice given on 16 July 2008 and taking effect on 15 August. He was on garden leave from 8 August.

2. By his form ET1 lodged at the Tribunal on 22 December 2008 the Claimant made various money claims totalling £4,199.67. In the event the parties were able to agree the amounts owed to the Claimant and by a Judgment with Reasons dated 19 August 2013 Employment Judge Wade ordered the Respondent to pay to the Claimant the total sum of £3,494.94 gross, plus expenses of £810. There is no appeal against that calculation.

3. The issue now before me concerns what used to be called a counterclaim brought by the Respondent. That claim was dismissed by Judge Wade. Against that ruling the Respondent appealed. The appeal was initially rejected on the paper sift by Recorder Luba QC for the reasons given in the EAT letter of 31 January 2014. Dissatisfied with that opinion the Respondent, then appearing in person through its principal, Mr Guy Templeton, exercised its right to an oral Appellant-only permission hearing under EAT Rule 3(10). That hearing took place before Langstaff P on 17 June 2014. For the reasons given in a Judgment delivered on that day the President allowed the appeal to proceed to this Full Hearing on two grounds.

Further complaints that the Judge had failed to make material findings of fact and had showed the appearance of bias were rejected.

4. Today, the Respondent is represented by Mr Edward Kemp of Counsel. I had the advantage of reading his carefully constructed Skeleton Argument, building on the two points identified by the President in his Rule 3(10) Judgment in advance of this hearing, and have heard his oral submissions in support of the appeal. The Claimant, Mr Gilbert, represents himself as he has throughout.

The Statutory Framework

5. Appeals to the EAT are on points of law only. Further, the EAT will not, save in exceptional circumstances, allow fresh points to be taken on appeal, applying the well-known **Kumchyk v Derby City Council** [1978] ICR 116 principle, as further explained by the Court of Appeal in **Glennie v Independent Magazines (UK) Ltd** [1999] IRLR 719. With those trite observations in mind my starting point is the **Employment Tribunals (Extension of Jurisdiction Order) 1994** (“the 1994 order”) under which the Respondent brought its counterclaim below.

6. At paragraph 7 of her Reasons the Judge makes passing reference to the Respondent’s right to bring a counterclaim under the **1994 Order**, subject to the statutory maximum of £25,000. Perhaps understandably, since the parties then appeared in person, she does not attempt any analysis of the reach of the **1994 Order** in the context of the claims raised by the Respondent.

7. In his Skeleton Argument Mr Kemp addressed the scope of the **1994 Order** by reference to Article 4, which I need not set out. He then correctly observes that the reference to section 131(2) of the 1978 Act, the **Employment Protection (Consolidation) Act**, must now be read as section 3(2) of the **Employment Tribunals Act 1996**. Again I shall not set it out.

8. An employer may bring a claim for damages for breach of a contract of employment. No question of a connected contract arises in this case.

9. However, the right under Article 4 is subject to the exclusion of claims to which Article 5 applies. Article 5, so far as is material, provides:

“This article applies to a claim of a contractual term of any of the following descriptions –

...

(c) a term relating to intellectual property;

(d) a term imposing an obligation of confidence;

(e) a term which is a covenant in restraint of trade.”

“Intellectual property” is then defined.

10. The possible application of the Article 5 exclusions to the questions of breach in this case is something with I raised with Mr Kemp in discussion. However, Mr Gilbert pursues no point in relation to the exclusion provision and therefore I need say no more about it.

The Counterclaim

11. Following a CMD held on 11 April 2013, also before Judge Wade, Mr Templeton produced an amended counterclaim setting out the Respondent’s case. The claims involve two principal allegations: first that the Claimant stole two fictitious TT-Total subscriber accounts in the names of Vassily Zworykin and Paul Mycock. In setting up those accounts the Claimant

was said to be in breach of Clauses 13.1 and 13.2 of the contract. Secondly, it was said that during his employment with the Respondent the Claimant worked clandestinely for a company, Stacey International, and that was said to breach Clause 3 of the contract.

12. Damages were quantified at (1) £12,337.50 in respect of use of the two fictitious subscriber accounts, (2) £23,983.76 in respect of clandestine work for Stacey and (3) expenses incurred as a result of the Claimant's working for Stacey rather than for the Respondent.

The Contract

13. The following terms are potentially relevant:

“3. DUTIES

During your employment you shall:-

3.1 During your working hours devote the whole of your time and attention and ability to your duties.

3.2 Well and faithfully serve the Company to the best of your ability and use your best endeavours to promote the interests of the Company.

3.3 Not be engaged, concerned or interested in any other business whatsoever without the written consent of the Company.

...

13. PROPERTY

13.1 You must not any time make use of the Company's property or documents or materials in which the Company owns in the Intellectual Property Rights for any purpose which has not been authorised by the Employer.

13.2 On termination of your employment you shall deliver up to the Company all correspondence, documents, lists, disks and other papers (or other means of storing or recording information) and all other property belonging to the Company or any of its clients or potential clients or any Associated Company and you shall not without the written consent of the Board take any copies thereof.”

The Facts

14. The Employment Judge made the following material findings of fact.

15. The Respondent provided:

“All types of intelligence information and analysis for Europe, Russia, the Caucasus and Central Asia”.

16. Amongst its services provided to subscribers was an intelligence platform called TT-Total (Reasons, paragraph 12). The focus of the Claimant’s work was on TT-Total; that was a difficult product to sell (paragraph 15).

17. In early February 2008 the Claimant was approached by Stacey, a publisher, to write a business guide to Russia. It was made clear that he would not make money from the book, but he decided to go ahead out of interest and as an addition to his curriculum vitae. He informed Mr Templeton, who agreed, provided that work on the book was not done in the Respondent’s time (paragraph 17). “Thus”, said the Judge, “clause 3.3 of the contract was waived”.

18. The Claimant admitted to a low level of communication between himself and Stacey during work time (paragraph 20).

19. In June or July 2008 the Claimant sent out about ten e-mails in similar form to contacts asking whether they were interested in taking out advertising in his forthcoming Stacey publication (paragraph 21). I interpose that it is the Claimant’s case that no advertising was placed a result of those enquiries. Indeed, he asserts that he received under £300 from the sale of the book for sales in 2009, after he had left the Respondent.

20. Following termination of the employment on 15 August Mr Templeton came across the two false TT-Total accounts. The Zworykin account was opened on 17 July and terminated on 1 October. The Mycock account was opened on 22 July and switched off on 17 August.

The Tribunal Decision

21. The Judge identified two questions in the counterclaim:

(1) Was the Claimant's involvement with Stacey a breach of clauses 3.1, 3.2 and 3.4 of his contract and if so what is the measure of damages?

The Judge held that there was probably not a breach of contract (paragraph 32), but if there was, no damage flowed (paragraphs 32 and 33).

(2) Was the opening of the false TT-Total accounts a breach of contract and if so what was the measure of damages?

The Reasons (paragraph 35) are not entirely clear as to whether a breach was made out; however, if it was no loss flowed. In particular (paragraph 36) she found that the costs of the provision of the Zworykin account for one-and-a-half months was so low as not to be quantifiable. All that the Respondent could come up with during the hearing was server time, unquantified but very small.

The Appeal

22. It is useful to begin with the President's analysis at the Rule 3(10) stage.

23. First, he thought that the Claimant's attempt to sell advertising in his Stacey book was capable of amounting to a breach of the contractual term of fidelity and loyalty. That term was express: see clause 3.2. If not, it would have been implied. Further, the President raised the possibility that if that breach is made out and the employee makes a profit from it, he may have to disgorge his profit to the employer. Arguably that compensation for breach of contract may fall within the **1994 Order**. Arguably, in those circumstances the burden lay on the Claimant to show that he did not profit from the breach.

24. Secondly, as to the two false TT-Total accounts the President opined that two questions arose. First, whether in opening those accounts and continuing to operate one for some period of time after dismissal was an (unspecified) breach of contract and secondly, as to loss, whatever the cost of providing the accounts to the Respondent, did the Claimant make profits to which the Respondent was entitled? Again, it was for the Claimant to show that he had not made any profit by the supposed breach.

25. In his written submissions Mr Kemp has taken me to high authority, including Attorney General v Blake [2001] 1 AC 268, for the proposition advanced in the President's Rule 3(10) Judgment that a party in breach of contract may be required to disgorge his profits by way of damages to the innocent party. I accept that general proposition of law.

26. However, there is a fundamental problem with that approach. It is that is absolutely plain to me that the Respondent did not put its claim for damages on that basis below. As Mr Gilbert puts it succinctly and, in my view, accurately in his Answer:

“If my understanding of Mr Justice Langstaff's Reasons for allowing Templeton Thorp's appeal to proceed to a Full Hearing is correct, it would appear that Mr Templeton has now shifted his argument from the financial loss I allegedly caused to his company to the financial benefit I ‘presumably’ took from my actions during my period of employment at Templeton Thorp.”

27. In these circumstances it is unsurprising that the Employment Judge did not deal with a head of loss which was not advanced before her. Had it been, the Claimant's case would have been that he derived no profit or benefit from either his quest for advertising or from use of the two TT-Total accounts.

28. Since it seemed to me that the Claimant was raising an objection to the Respondent adopting this new way of putting the damages claim, not advanced at the ET hearing, in his

unsuccessful reconsideration application below, refused by the Employment Judge on 23 October 2013, nor in his Grounds of Appeal, I invited Mr Kemp to address me on that preliminary objection, assuming (a) that breaches of contract were made out and (b) that an account of any secret profit made by the Claimant as a result of the breaches was recoverable under Article 4 of the **1994 Order** and could be set against the monies otherwise payable to the Claimant. He acknowledged that the way in which the damages claim was formulated by the President at the Rule 3(10) Hearing, at which the Claimant was not present, was not the way it was framed below; however he submitted that at the CMD Employment Judge Wade ought to have pointed out that possible way of putting the claim to the Respondent, acting in person, and further that the claim was covered by the Respondent's claim for repayment of salary after February 2008. Alternatively he submits that this is a point of general public interest and ought to be heard.

29. I reject those submissions. First, it was not for the Employment Judge at the CMD to formulate the Respondent's counterclaim. He was given that opportunity by way of his amended counterclaim. It is for the parties, whether represented or not, not the Employment Tribunal to put forward their claims. Secondly, the amount of time in which the Claimant was engaged in seeking to sell advertising and on the two TT-Total accounts between 17 July and his going on garden leave on 8 August 2008 was, on the Judge's findings, *de minimis*. In any event, that is not the basis on which the President allowed this appeal to proceed to this Full Hearing. Given the age of the case I shall not permit any further and different way of putting the appeal. It does not seem to that any exceptional circumstances are raised such as to permit the Respondent to take advantage of the newly formulated claim.

30. It follows that I uphold Mr Gilbert's objection to the way in which the appeal is sought to be advanced. To allow the appeal would be to require a rehearing below, at which the factual question as to whether or not the Claimant profited at all from the assumed breaches would require further evidence and argument. That is not permissible.

31. In these circumstances this appeal fails and is dismissed.