



THE EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr N Bontempi

v

Latin Squares Limited

Heard at: London Central

On: 26 October 2018

Before: Employment Judge Walker

Representation: Mr J Long, friend and retired TU Representative

Respondent: Mr Chaudhry, Solicitor

REASONS

1. The Claimant brings a claim for unpaid wages and unpaid bonus under Section 13 of the Employment Rights Act 1996. The Respondent had not entered a response.

Application by Respondent for an extension of time to file a response.

2. The Respondent did not attend today but did send a representative, Mr Choudhry, who made an application on behalf of the Respondent for an extension of time on behalf of the Respondent. I was referred to the case law and the background considerations I should bear in mind.

3. I was told by Mr Choudhry that the Respondent had failed to enter a response due to a genuine misunderstanding. Mr Choudhry could not tell me anything about that misunderstanding. He was told that as soon as the Respondent became aware that it had failed to comply with the time limit it sought assistance and instructed their present representatives. Mr Choudhry said he had encountered some difficulties getting instructions from Mr Farnesi, who we know is

the managing director of the Respondent, as Mr Farnesi's brother had recently suffered a heart attack. Notwithstanding that, Mr Choudhry had received a copy of the employment contract from the Respondent and had been given the information about the defence. The Respondent said it had a strong defence, although at this stage the Respondent had not produced a draft defence. Mr Choudhry confirmed that the Respondent did not contest the Claimant's claim for arrears of pay but did contest the claim for unpaid bonus on the basis that the written contract terms made clear the fact that the bonus was not due.

4. The explanation given for the defence was that the Claimant's contract at Clause 6.2 confirms that the bonus was payable in one lump sum, not in separate payments and will be paid in the next financial year.

5. I was reminded of the approach which Tribunal's should take as set out in the case of **Kwik Save Stores Limited v Swain and others [1997] ICR 29**. That case pointed out that the process is one of exercising discretion which involves taking into account all relevant factors, weighing and balancing them one against the other and reaching a conclusion which is objectively justified on the grounds of reason and justice. The factors that are important are the explanation supporting the application. The more serious the delay the more important it is that the Employment Judge is satisfied that the explanation is honest and satisfactory. In addition to that the Tribunal will often favour an extension being granted where the defence is shown to have some merit. Also the balance of prejudice. If the employers request for an extension of time was refused, would it suffer greater prejudice than the employee if the request was granted.

6. I was also reminded that the Tribunal also has to have regard to the overriding objective. The factors forming part of that were drawn to my attention, being the need to ensure that the parties are on equal footing, dealing with cases in ways which are proportionate to the complexity and importance of the issues, avoiding unnecessary formality, and seeking flexibility as well as avoiding delay, so far as compatible with the proper consideration of the issues, and saving expense.

7. The Claimant had attended today and wished to proceed. The Claimant had suffered considerable difficulties as his family had been unable to live in the UK together as his wife needed immigration permission which was refused due to his apparent problems with his income and he had attended today having come over from Italy. He had been out of pocket for some time. I noted that the Claimant's claim form said that he had been trying to get his outstanding money for some time.

8. Applying the approach taken by Kwik Save, I do need to have some explanation for the delay. The vague reference to a misunderstanding is not sufficient. Without more that was inadequate for me to conclude whether the explanation was reasonable or indeed honest or had any basis on which I could evaluate what had happened. The ET3 should have been submitted on or before 8 October. The Respondent should have received a Tribunal letter sent on 23 October 2018 explaining that a default judgement was about to be issued. Peninsula were instructed on 25 October. This hearing was the following day – 26 October. Therefore, the ET3 is over two weeks late. There is no draft ET3 and I do not have any reason for the delay other than a vague reference to a misunderstanding.

9. I understand that the Respondent's brother has suffered a heart attack very recently and that has made communication difficult but I have no medical details and it is not clear why it was not possible for Mr Farnesi to have talked to Mr Choudhry by phone to explain the reason for the misunderstanding. Providing an explanation of what the misunderstanding was, would have been possible. In those circumstances without that explanation I was concerned that it was not reasonable to grant the extension of time that was requested.

10. In applying the overriding objective, I have to take into account the prejudice to the Claimant who has already been out of pocket for some considerable time. He told me his wife's application to remain with him in the UK had failed as the evidence of his income was inadequate and they had been forced to return to Italy. He had attended this hearing having travelled from Italy. It is clear that the parties had been in communication for a while and there has been ACAS conciliation in May. I know that the Claimant resigned in May and that he had

written and asked for his money. In all the circumstances, the prejudice to him of allowing the Respondent further time to serve a response and then arranging a further hearing is quite considerable. If I were to have granted the extension that would involve further delay and prejudice to the Claimant.

11. Overall the balance of prejudice favours the Claimant, provided that I take steps to ensure the Respondent's arguments about the contract are fully considered. Accordingly, I refused the extension.

12. In order to reduce the prejudice to the Respondent I have considered the defence I was told the Respondent would have entered. I accepted the copy contract supplied by the Respondent as evidence and questioned the Claimant about it. I also confirmed the issues with Mr Choudhry and allowed him to participate in the Hearing to a considerable extent, particularly by making submissions. Also, I checked with Mr Choudhry whether there was anything more I needed to cover in questioning the Claimant and ensured I had addressed all matters which the Respondent would have wished to address.

13. On that basis the hearing proceeded.

Evidence

14. I heard evidence from the Claimant himself and he produced a few documents. I also had the contract from the Respondent. The Claimant did not have spare copies although we made a copy of one letter dated 18 April 2018 which was sent by the Respondent, Latin Squares, addressed "to whom it may concern" and signed by Mr Farnesi. This was a letter which verified the employment for the Claimant, Mr Bontempi, and set out an outline of the remuneration terms including his gross annual summary and a reference to his annual bonus being between £7,000 and £15,000.

The Issues

15. As I have noted the Claimant's claim for unpaid salary was admitted by the Respondent's representative, Mr Choudhry, today.

16. I am told that the Respondent's application for an extension related to the claim for bonus which the Respondent wished to defend. I was told this was because under the written contract, the terms for the bonus meant it was not due.

17. Therefore, the issues are as follows:

- are the terms of the written contract applicable, or:
- has the contract been varied so that the bonus was to be paid by four equal instalments as the Claimant says some of which had not been paid.

Facts

18 The facts I found are these. The Claimant worked for the Respondent from 1 August 2016 according to the letter of 18 April 2018, which had been prepared by Mr Farnesi for the Immigration authorities. The working arrangements clearly varied from time to time and it appears that in July 2017 the parties entered in to a new contract of employment. The written contract states that the employee's employment began in July 2017. That contract was dated 18 July 2017. It had a reference to payment and it referred to the annual bonus as follows:

“the company may pay the senior architect an annual bonus. The bonus scheme is based on project profitability and the amount is variable between £6,500 and £15,000 each year. The company shall pay any bonus in one lump sum subject to deductions and withholdings during the year immediately following the year to which it relates.”

19 It goes on

“the employee's salary will be reviewed each year on September although there will be no obligation on the company to award an upward increase following any such review. Any changes in the employee's salary will be confirmed to the employee within his payslip.”

20 The Claimant says that the written terms for the bonus were varied by way as there was a discussion which he thought that happened in the first week of September 2017 when he and Mr Farnesi talked about his remuneration. The Claimant explained his outgoings, including his rent and supporting his family, were such that he could not wait for his bonus until the following year. Mr Farnesi then agreed to pay a minimum bonus of £7,000 in four instalments the first of which was paid in September 2017 in cash, but no others were paid.

21 The Claimant said Mr Farnesi kept promising to pay him and he kept chasing it up but he was never paid. As I have noted the letter which was prepared in April 2018 for the immigration authorities refers to a £7,000 minimum bonus rather than £6,500, indicating that there had been a change of some sort in the terms agreed originally as recorded in the written contract.

Submissions

22 The Respondent's position was that there was no change to the contract. That meant I should reject the Claimant's evidence which requires me to take a negative view of the Claimant's credibility. I was asked by the Respondent's representative to review the Claimant's credibility.

23 The Respondent suggested that the first payment was made in September which was only two months after the contract commenced. That made no sense particularly as it was claimed that the bonus payments were to be paid every three months. It was also suggested that a cash payment as alleged made no sense and it was suggested that there was no reason for such a variation when the Respondent could have waited till the following year to make the payment.

24 The Claimant's submissions were that the Claimant was a credible witness and I should believe his case.

The Law

25. The law is set out at Section 13 of the Employment Rights Act which provides that an employer shall not make a deduction from wages of a worker employed by him except in certain specified circumstances. Wages are defined in

Section 27 and include any fee bonus, commission, holiday pay or other emolument. So, bonus payments are covered by that.

26. Section 23 provides that claims can be brought before an Employment Tribunal and Section 24 says that where a Tribunal finds a complaint well founded it shall make a declaration to that effect and order the determine the amount due.

Conclusion

27 The first matter I considered was the Claimant's credibility. Effectively the parties clearly entered into a written contract under which the bonus would not have been due. The Claimant's claim was based on that contract having been varied and Mr Choudhry had submitted that this evidence was not credible for the reasons I have noted.

28 In relation to the argument that it made no sense for the Respondent to have varied the contract in a way which was to its detriment as the money fell due earlier than would otherwise have been the case, I do not think this is inevitable. Employers do sometimes make improved financial agreements rather than lose a valued employee. Mr Bontempi's evidence was that he told Mr Farnesi that he could not remain employed under the terms he had previously agreed. He needed more money and to pay a lump sum sooner than might otherwise have been the case simply seems to have been a recognition of Mr Bontempi's financial requirements. I note that a discussion in September would coincide with the period when the employee's salary was due to be reviewed according to clause 6.3 of the contract.

29 I cannot read much into the cash payment. I know that the Claimant says that Mr Farnesi had cash flow problems and maybe he found that easier to manage them by paying them through the usual process.

30 Importantly I found the Claimant credible. He gave ex tempore evidence. He talked quickly and without hesitation. I thought that the manner in which he spoke had all the hallmarks of a credible witness. The Claimant did not have a

written witness statement. He simply answered questions and explained the situation.

31 I also take note of the fact that the letter of 18 April recorded slightly different terms from the contract, in particular a £7,000 annual bonus. That indicates there had been a change in the original arrangements.

32 As a result, I accept that the contract was varied by a discussion in September during which Mr Farnesi, as the managing director of the Respondent, agreed that the annual bonus would be a minimum of £7,000 which would be paid in four equal instalments throughout the year, rather than deferred until the following year. I also understand that what he also agreed was that if there was more to be paid that would be considered later on, but the minimum would be paid in this fashion. I accept that that is the case and effectively the parties agreed there would be a minimum bonus payable in instalments at three monthly intervals.

33 The conclusion I have reached therefore is that the Claimant's claim succeeds and that the Respondent is liable to pay the Claimant, not only the admitted missing salary which is outstanding, but also the missing bonus payments.

Employment Judge Walker

Dated 8 November 2018

Reasons sent to the parties on:

9 November 2018

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For the Tribunal Office