



EMPLOYMENT TRIBUNALS

Claimant: Mr Nigel Nieddu
Respondent: Bloom Finance CIC Limited
Heard at: Southampton On: 10 April 2019
Before: Employment Judge Gardiner

Representation:

Claimant: Mr Powlesland, counsel
Respondent: Mr Kaihiva, counsel

JUDGMENT having been sent to the parties on 12 April 2019, the following written reasons are provided in response to the request made by the Respondent dated 24 April 2019.

REASONS

1. Mr Nieddu brings a claim for unpaid earnings and one weeks' notice pay against the Respondent. He had also previously brought a claim for unfair dismissal. That claim was struck out because he did not have the required period of continuous employment. This meant that the Tribunal did not have jurisdiction to consider that claim on its merits.
2. At the start of this morning's hearing, his counsel, Mr Powlesland, indicated that he was no longer pursuing a claim for holiday pay, nor a contractual claim for the value of his shareholding. Those claims will be dismissed upon withdrawal.
3. It is common ground that the Claimant was a Director of the Respondent between 3 April 2017 and 28 November 2017. It is also common ground that he did not have a contract of employment at any point during that

period. What is disputed is whether he was working on a full time basis as the Respondent's CEO during the whole of this period or part of it. That is his case, notwithstanding the lack of an employment contract.

4. The Respondent contends that any work carried out during this period was preparatory to a potential future role as the Respondent's CEO. It contends that the role was never implemented because the sources of funding on which the role depended never materialised. As a result, there was no obligation to pay the Claimant for the time spent on the Respondent's business.
5. I have heard evidence from the Claimant himself and from Mr Andrew Pordage, who became involved in the Respondent from July 2017 onwards as part-time Finance Director. I also heard evidence from Mr Charles White on behalf of the Respondent, who was involved from August 2017 onwards.
6. I have also been referred to certain documents in an agreed bundle. These documents have been garnered from the Claimant's personal email address. Documents on the Respondent's server are no longer available as a result of a dispute between the Respondent and its IT provider. As a result, I need to place greater emphasis on the oral evidence I have heard because the issue is not so readily apparent from the documents.
7. Mr Nieddu's evidence was that at the outset, he and his three fellow incoming Directors were each promised the sum of £45,000 per annum for full time work. This is consistent with point 16 in the Heads of Agreement document. This records that the salaries and performance pay for all Directors will be on level terms within the constraints of the Company Policies. Mr Nieddu was to be Chief Executive Officer as set out in point 1 of the same document.
8. Thereafter he worked on a full time basis, sometimes in Bournemouth or with potential suppliers or customers, sometimes from one or other of their homes. Latterly there was an office closer to their homes. There has been no evidence called by the Respondent to contradict that position in relation to the period up until the middle of August 2017.
9. Mr White, the only witness called by the Respondent, can only speak to events after the middle of August 2017, which was when he first became involved. He had only two meetings with the Claimant, and spent, on his own evidence, 2-3 hours per week on the Respondent's business. Much of that was on the telephone. I do not consider that he is well placed to contradict the Claimant's evidence as to the amount of work that the Claimant carried out even after mid August 2017. His conclusion that there was little if any work carried out by the Claimant is based on the lack of product provided by the Claimant, rather than the Claimant's lack of endeavour.

10. At one of those two meetings, Mr Nieddu told Mr White that he had been promised £45,000 pa in salary and had not yet received any of it. That is consistent with the Claimant's case.
11. Mr Pordage, who gave evidence for the Claimant, recalls seeing a spreadsheet setting out the Respondent's costs for the financial year 2017/2018. He specifically remembers seeing provision for £45,000 to be paid to each of the four directors throughout that financial year. That is one of the many documents that is no longer available as a result of the dispute between the Respondent and its IT provider. I accept that there was such a document and that Mr Pordage evidence is accurate as to what it contained. Mr Pordage is effectively an independent witness. Whilst engaged for a short time in a Finance Director role, he had agreed that he would do this for free, hoping that his efforts to find sources of funding would enable the company to turn around the financial difficulties and become profitable. That never became the case and so he accepts he personally had no entitlement to pay. He attended the tribunal without any axe to grind, attempting to help the tribunal as best he could. Again this supports the Claimant's case.
12. Mr White's evidence was that there was never any payment obligation because there was never any product from the Claimant's work. It was a results based arrangement. However, because he was not around at the start of the arrangement he cannot give direct evidence to that effect. This impression may have been given to him by Michael Grimsdale, who was a significant shareholder and also a director until his removal in contentious circumstances towards the end of the relevant period. Mr Grimsdale would have been the natural person to have given evidence for the Respondent to contradict what the Claimant was asserting. He has apparently not appeared today for 'family reasons' and there is no explanation as to why he has not provided a witness statement.
13. It is inherently unlikely that the Claimant and his fellow directors would have started a role and worked in it for several months without a salary figure having been agreed at the start. I find that the Claimant was promised £45,000 pa to perform the role of Chief Executive Officer. He did so as an employee. In the Heads of Agreement it anticipates that he would be provided with a written contract of employment, although this was never done. Having worked in that role throughout the period until his summary dismissal, he is entitled to recover such a sum by way of a complaint under Section 23 of the Employment Rights Act 1996 for unauthorised deduction of his wages. This sum is £29,769.23 gross.
14. In addition, he is entitled to receive £865.30 by way of notice pay for his statutory entitlement to receive one-week's paid notice.
15. He is also entitled to recover a sum under Section 38 of the Employment Act 2002 for the Respondent's failure to provide him with a written statement of his employment particulars. The tribunal's discretion is to

make a payment between 2 and 4 weeks pay in recognition of the Respondent's failure.

16. The relevant sub-sections of Section 38 read as follows :

(3) If in the case of proceedings to which this section applies-

(a) the employment tribunal makes an award to an employee in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996 or under section 41B or 41C of that Act

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

(4) In subsections (2) and (3) –

(a) references to the minimum amount are references to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.

17. I consider that it would be just and equitable to make an award of four weeks pay, capped at the statutory maximum. This is $4 \times \text{£}489 = \text{£}1956$. This is because there was no statement of any written particulars provided at any point during almost eight months of employment; and no good reason given as to why this could not have been done.

18. I have not been addressed on the issue of any uplift under Section 207A of the Trade Union and Labour Relations (Consolidation) Act for failing to comply with a relevant ACAS Code of Conduct. This has not formed part of the Claimant's claim at any point. As a result, I do not make any award.

Employment Judge Gardiner

2 May 2019