



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondent

Mr I Shepherd

Access Jobs Ltd

Heard at: London Central

On: 25 November 2019

Before: Employment Judge Davidson

Representations

For the Claimant: did not attend

For the Respondent: Ms Y Montaz, Consultant

RESERVED JUDGMENT

Note

1. This is a case which had been case managed on several occasions and had been adjourned previously, most recently on 14 August 2019 at the request of the claimant, whose granddaughter had been in a riding accident.
2. The claimant sent an email at 9.45 am this morning to inform the tribunal he would not be attending today's hearing due to illness. The respondent confirmed that the claimant had informed Simon Crick on Wednesday 20 November that he would not be attending the hearing. Evidence of this was produced to the tribunal. The claimant was not present to explain why he had notified the tribunal several days after notifying the respondent.
3. In the claimant's email, he requests that the tribunal either adjourns the hearing or that it proceeds in his absence. Having considered all the information before me and the representations on behalf of the respondent, I decided that the hearing would go ahead in the claimant's absence.

4. In the absence of the claimant, I considered his claims on the basis of the evidence I had before me, including witness statements from Simon Crick and Jamie Baldwin, oral evidence from Simon Crick and a bundle of documents running to nearly 400 pages. I did not have before me any witness statement from the claimant, despite him having received an order to serve one, nor did I have the 'evidence' of other matters which the claimant had stated in correspondence that he intended to produce at the hearing. I used the Originating Application and points he had made in correspondence as the basis of his claim.
5. I asked the respondent's representative if they were making a strike out application on the basis of the dissolution of the respondent and/or the claimant's failure to attend and she confirmed that she was content for the hearing to go ahead today on the merits and that she was not pursuing the strike out application at today's hearing.
6. I heard live evidence from Simon Crick and was able to question him. I decided to reserve my decision so that I could consider in more detail all the written evidence before me.
7. Having taken into account this evidence, I make the following Judgment.

Issues

8. The claimant is claiming unpaid wages, holiday pay and notice pay. The claims arise from the work he performed for the respondent between June 2018 and April 2019. The respondent accepts that he provided services and that he has not been paid but contends that he was not an employee and that the arrangement was that he would only be entitled to be paid once the business could afford it.
9. The respondent's representative also relies on the fact that the respondent no longer exists, having been dissolved on 25 June 2019.

Facts

10. The respondent is a start-up software development business. As is common with start-ups, people invest time and money in the hope of the business succeeding and returning substantial returns on the investments but in the knowledge that many start-ups fail and the investment is lost.
11. The claimant had his own business in the truck/haulage sector, Torus Logistical Solutions Ltd. He was introduced to the directors of the respondent who were planning to develop a start-up product which would facilitate contract recruitment of HGV drivers through a technology platform. A salary of £60,000 was proposed with increases depending on the success of the business.

12. The claimant began providing advisory services to the respondent in June 2017 while still running his own business. He is based in the North -East and the business was based in London. The claimant attended some meetings in London, participated in telephone calls, engaged in email correspondence and gave advice when requested. The parties agreed that he would not take any money until the business was profitable. It was proposed that the claimant would accrue a notional salary but payment would be made once the business had funds to do so. He was also offered share options of 1% of share capital.
13. No contract of employment was entered into although it was discussed. The decision was taken not to do this until the business was running at a profit.
14. Others involved in the development of the business were on a similar arrangement although there was one employee being paid monthly from the funds raised to start up the business. He worked full time in the business unlike the claimant.
15. I find that the claimant was not an employee of the respondent. I find that he was providing services with a view to joining the business as an employee at a future date.
16. In early 2018, the shareholders had a falling-out, which affected the prospects of the business. When the shareholders went their different ways, the claimant elected to join another company in April 2018 and he discussed with Simon Crick how he would be paid for the work he had done until then.
17. Simon Crick confirmed that the claimant should be paid for the work he had done in accordance with the agreement they had reached and suggested this might be by way of a contractor's invoice. He confirmed that the obligation to pay him would not be affected by the claimant joining a new employer. The amount owing was calculated by the respondent to be £64,167, but it was stated that this would only be payable once the business could afford it. There was some correspondence between the claimant and Simon Crick, who then passed the matter to the Finance Director Paul Fava.
18. Paul Fava told the claimant that the agreement had been that he would only be paid once the business could afford it. He stated that this condition had not been met and no money was payable.
19. I accept that this was the arrangement between the parties, as evidenced by contemporaneous documents and the facts as I have found them.
20. In the event, the business had no revenues and therefore no profits. The company was voluntarily dissolved in June 2019. The claimant states that he has applied for the company to be restored but there is no evidence before me that this application has been made since June 2019 or that it

has been restored. I therefore accept that the respondent is not in a position to make any payments in any event.

21. The claimant alleges that Simon Crick's new business, Connected2 Ltd, has been using assets from the respondent including code that he worked on for the benefit of the respondent. Simon Crick has confirmed that Connected2 Ltd has not used any code which was developed on behalf of the respondent.
22. The claimant has included screenshots of technology being used by Connected2 Limited which he claims is using work done by him. To the extent that the claimant is alleging that his intellectual property has been used by Connected2 Limited, the tribunal does not have jurisdiction to consider this complaint. If the claimant is relying on the images as evidence that he did perform services for the respondent, I accept this is the case and it has not been contended by the respondent that the claimant did not work for them.

Determination of the issues

23. In the light of my findings regarding the relationship between the claimant and the respondent and the agreement they reached regarding financial compensation, I find that the respondent does not owe the claimant any money because the condition required to trigger payment of the notional salary was not satisfied.
24. The claimant's claims are hereby dismissed.

Employment Judge Davidson

Date 25 November 2019

JUDGMENT SENT TO THE PARTIES ON

26 November 2019

FOR THE TRIBUNAL OFFICE