



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr J Jakes

v

Clockwork Removals Limited

Heard at: Watford

On: 25 October 2019

Before: Employment Judge Skehan

Appearances:

For the Claimant: In person

For the Respondent: Mr MacInnes (HR Manager)

JUDGMENT having been sent to the parties on 15/11/2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant issued proceedings by form ET1 dated 07/02/2019. This set out a claim for constructive unfair dismissal and unauthorised deduction from wages. The matter was defended.

2. Section 95(1)(c) of the ERA provides that:-

“if an employee resigns in circumstances in which they are entitled to terminate their contract of employment by reason of an employer’s conduct that amounts to a dismissal”.

3. The case of Western Excavating v Sharp [1978] is still good law in this area. Western Excavating provides:-

“If the employer is guilty of conduct which is a significant breach going to the root of a contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any other performance. If he does so, then he terminates the contract by reason of the employer’s conduct and he is constructively dismissed.”

4. Should a constructive dismissal scenario exist, I must thereafter consider whether the dismissal was unfair having regard to section 98(4) Employment

Rights Act 1996 ('ERA').

5. The respondent is a removals company providing removal and storage services on a domestic and commercial basis operating throughout the UK.
6. The claimant was employed between 22/10/2006 and 31/12/2018 as a sales estimator.
7. I heard evidence from the claimant on his own behalf. On behalf of the respondent I heard evidence from Mr Mann and Mr Kruger. All witnesses gave evidence under oath or affirmation. Evidence in chief was given primarily by reference to witness statements. Permission was allowed to adduce further evidence in chief where requested. All witnesses were cross-examined.
8. The claimant's claim for unauthorised deduction from wages and constructive dismissal were based upon an alleged breach of the express contractual obligation upon the respondent to pay commission. The claims related to a particular commission payment of £880.30. The claimant's contract of employment provides at clause 8.4, headed "bonus scheme":

"a commissioned base bonus scheme is in place for your role. The commissioned based bonus scheme will be calculated at 5% of gross profit on competitive work secured. Thereafter your bonus will be agreed on the set targets discussed. This bonus scheme is reviewed on a regular 6 monthly basis and is subject to change at the company's discretion, you will be fully consulted of any changes to the scheme as when appropriate, which will be confirmed in writing following consultation. A copy of the particular scheme relevant to you is available from the finance director "
9. The claimant received his basic salary and regular commission payment. The claimant's normal commission payments were relatively modest in the region of £50 or less per individual commission payment. A potential commission payment of over £800 was highly unusual. On 21/11/2018 the claimant was provided with an internal report that showed a potential commission payment of £880.30 being due. This payment related to a client who had moved two previous times using the respondent. The first time, the client dealt directly with the claimant, he earned commission on the normal basis. Then this client came back to the respondent and dealt with the respondent for a move from the US back to the UK. This move went ahead without any involvement from or payment of commission to the claimant. The third move by this particular client generated the disputed commission payment. This was a move from the UK to the US, involved the Glasgow office of the respondent's business and included a large insurance element.
10. The respondent told the employment tribunal that as the proposed commission was an unusually large amount, it attracted particular attention and scrutiny by the respondent. The respondent said that smaller payments of commission were often paid without similar scrutiny. This particular payment was examined by the managing director, Mr Mann. Mr Mann considered that commission was not payable as the work was not properly deemed competitive nor was it generated by way of a competitive quote. Mr Mann said that he although he did not consider that commission on this matter was properly payable to the claimant he made a discretionary payment

of £100 to reflect the claimant's input and reflect the time spent by the claimant that could have potentially been used to work on other clients where competitive commission payments would be paid.

11. In relation to the definition of 'competitive work' I was referred to pages 21 and 22 of the bundle. The relevant part of this document is the definition of "competitive work" and this says that:

"commission payments will only be made on competitive work secured, and that competitive work secured means that the removal quote has been won when bidding against other removal companies".

12. There was disagreement between the parties in respect of whether this document had ever been provided to the claimant and it was accepted by the respondent that aspects of this document did not apply to the claimant, for example, the respondent accepted that the claimant was entitled to commission on repeat business. I was referred to the respondent's treatment of commission generated relating to their 'Disaster Care' contract. This was a contract where the respondent had agreed a particular price with a corporate client. Both parties agreed that the 'Disaster Care' contract was an example of non-competitive work where commission would not be payable. It was accepted by the claimant during the course of cross-examination that the 'competitive' element of the work was a fundamental factor in commission being paid and it was accepted by the claimant that where the work was non-competitive, no commission would be paid. I conclude on the balance of probability that the document referred to above (Page 21/22) was provided to the claimant at some point prior to the current dispute and that proper interpretation of 'competitive work' includes the expectation of 'bidding against other removal companies'. In practice, in the absence of express indication present in this particular case as set out below, and in light of the relatively small sums involved, commission on private client work tended to be paid without particular scrutiny of the circumstances by the respondent.
13. It was the claimant's evidence that all of his previous private clients have been deemed eligible for commission and commission has been paid on all of these matters. This large commission payment was no different. He says that private client work, as opposed to corporate work, is deemed competitive work. It was accepted by Mr Mann that it is not always possible to say whether individual clients are 100% competitive. Potentially when dealing with individual clients, they may be looking elsewhere but they may be comparing quotes and they have no obligation to tell the respondent if they are looking at alternative removal companies, and the respondent will not always know.
14. Considerable emphasis is placed by the respondent on the e-mail from the client of 2 July with the Glasgow office that is at page 68 of the bundle. I considered this e-mail to be an important e-mail also. Within it, the client gives the dates of the move, asks to be booked in and discusses some practicalities of the move. It does not ask for a quote. I conclude on the balance of probability that there was no negotiation on price and that the respondent's services are not being considered alongside competitors. All of the available evidence points to a situation where a client who was

moved twice before using the respondent services, had good service and wished to use the respondent's services again without considering other potential removal companies. I have also considered the involvement of the international element within this client move and the Glasgow office, and the overall picture painted is the picture of a client returning to the company with the intention of using their services, rather than a client who is searching and comparing removing companies to compare and contrast services. All of these factors lead me to conclude, on the balance of probabilities that this particular client interaction is not properly deemed to be 'competitive'.

15. It is possible that previous similar situations have existed on claimant's part where commission has been paid out but they have resulted in low level of commissions and they have not resulted in the same level of scrutiny being applied to the commission payment. However, it is accepted by the claimant that to be properly eligible for commission, the work must be competitive. In those circumstances, I do not believe that previous payments made in error could be relied upon to create a contractual entitlement to this particular commission payment, where I have found the work not to be competitive.
16. The claimant referred to matters and potential grievances other than the payment of the above commission. However during the course of cross-examination the claimant told the employment tribunal all previous issues or grievances had been made manageable. While he did not always agree with previous decisions made by the company, he lived with them.
17. I note that it is unlikely that at the time of his resignation, the claimant had sight of the e-mail from the client that I have been provided with. I also note that the withholding of the commission from the claimant is likely to have, from the claimant's perspective, felt unjust. Whilst I found that there is no contractual obligation upon the respondent to make this particular payment of commission, I can understand the frustration felt by the claimant in these circumstances.
18. In applying the law to the circumstances of this case I look first to the express terms of the contract of employment. The claimant had an express entitlement to commission in accordance with the contract of employment is set out above. I have found that commission is only properly payable in the case of 'competitive work'. The commission payment claimed does not arise from competitive work. In the circumstances I find that the claimant has no contractual entitlement to this commission. There respondent has not breached the express terms of the claimant's contract of employment relating to commission.
19. I have looked very carefully as to whether or not there is anything before me that could go towards a constructive dismissal claim on the basis of a 'final straw' type scenario. The claimant has referred to various issues raised previously with the respondent. However, the main issues that I have been referred to have been some considerable time ago. The claimant accepted during the course of cross examination that all previous issues have been addressed to the extent that 'he could live with'. The claim under consideration has been centered around this particular one

commission payment and in light of my decision that no commission was properly payable in this instance, I cannot see any course of action that would lead me to consider that a last straw type of scenario exists. The respondent has complied with the express and implied terms of the claimant's contract of employment. The claimant did not resign in circumstances that amount to a dismissal as set out in S95(1)(c) of the ERA.

20. For these reasons, the claimant's claims must fail and they are dismissed.
21. The Judgment was sent to the parties on 15/11/2019. The initial request for written reasons was received by the employment tribunal on 26/11/2019. This request was, due to administration oversight, not forwarded to me until 29/01/2020. Thereafter, I was not in attendance at Watford employment tribunal to check the physical employment tribunal file and finalise these reasons prior to March 2020. I apologise to the parties for the delay in providing these written reasons.

Employment Judge Skehan

Date: ...10.03.2020.....

Judgment sent to the parties on

.....10.03.2020

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For the Tribunal office