



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr R Haynes

and

Respondent

FSD Pharma Inc

Heard at Reading on: 13 March 2020

Appearances

For the Claimant: Mr M Lafferty, solicitor

For the Respondent: Miss C Lord, counsel

Employment Judge: Vowles

RESERVED JUDGMENT

Evidence

1. The Tribunal heard evidence on oath and read documents provided by the parties and determined as follows.

Unpaid Wages – section 13 Employment Rights Act 1996

2. The Claimant was subject to unauthorised deductions from wages and is awarded £41,025 in compensation.

Unpaid Holiday Pay – regulation 30 Working Time Regulations 1998

3. The Claimant was owed holiday pay and is awarded £7,692 in compensation.

Breach of Contract (Unpaid Expenses) – article 3 Employment Tribunals Extension of Jurisdiction (E&W) Order 1994

4. The Claimant was owed expenses is awarded £11,030 in compensation.

Total Award

5. The total award is **£59,747** and the Respondent is ordered to pay this sum to the Claimant.

Reasons

6. This judgment was reserved and written reasons are attached.

Public Access to Employment Tribunal Judgments

7. The parties are informed that all judgments and reasons for judgments are published, in full, online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the Claimant and Respondent.

REASONS

SUBMISSIONS

1. On 16 April 2019 the Claimant presented a claim to the Tribunal with complaints of unauthorised deduction from wages, unpaid holiday and unpaid expenses (breach of contract).
2. On 12 June 2019 the Respondent presented a response and denied all the complaints.

EVIDENCE

3. The Tribunal heard evidence on oath from the Claimant Mr Rupert Haynes (Chief Executive).
4. The Tribunal also heard evidence on oath on behalf of the Respondent via Skype link from Mr Raza Bokhari (Executive Co-Chair and Chief Executive Officer) and from Mr Donal Carroll (Chief Financial Officer).
5. The Tribunal also read a bundle of documents provided by the parties.

FINDINGS OF FACT

Background

6. The Respondent is a Public Limited Company incorporated in Canada. It is a specialty Biotech Pharmaceutical Research and Development company focused on developing approved synthetic compounds to treat certain diseases of the central nervous system, disorders of the skin, gastro intestinal tract and musculoskeletal system.
7. The Claimant was employed as the Chief Executive of the Respondent from 3 December 2018 until his dismissal on 5 February 2019, at a gross annual salary of £400,000 per year. The contract of employment stated at clause 9 that he would be paid in equal monthly instalments of the last day of each month, that is £33,333 gross pay per month.

The Claimant's Case

8. The Claimant's claims were as follows:
 - a. He was not paid any salary payment for the period 1 January 2019 to 5 February 2019 – outstanding sum of £41,025.64.
 - b. He was owed expenses of £11,030.

- c. He was owed five days pay for untaken holiday – a sum of £7,692.
9. Following a meeting on 5 February 2019 at which the Claimant was summarily dismissed by Dr Bokhari, the Claimant received a dismissal letter dated 5 February 2019, which included the following:

“Confirmation of summary dismissal

Following our meeting earlier today I am writing to confirm that your employment with FSD Pharma Inc has been terminated without notice for gross misconduct.

The reason for your dismissal is that there are concerns regarding your performance and competency to perform the role of Chief Executive. This was a serious breach of your obligations such as to warrant dismissal without notice and without any warnings.

The following arrangements apply with immediate effect:

- (a) Your dismissal takes effect immediately and your final day of employment is therefore 5 February 2019.*
 - (b) You are not entitled to any period of notice or payment in lieu of notice. Your participation in any compensation or equity plans shall terminate immediately.*
 - (c) You shall receive any outstanding wages and holiday entitlement as part of your final payment of salary. This shall be subject to normal deductions of tax and National Insurance.”*
10. The Claimant also said that he was told at the dismissal meeting, by Mr Carroll and by Dr Bokhari, that he would be paid for all monies owed and would “*receive all monies owing in salary and expenses*”.
11. In an email also dated 5 February 2019, Dr Bokhari said, amongst other things, “*I will request Donal [Mr Carroll] to process your payroll due and expenses submitted.*”
12. The Claimant also referred to a draft settlement agreement prepared by the Respondent, but not entered into by the Claimant, which included the following:

“Wages and expenses

Notwithstanding that your employment was terminated for cause in the probationary period on the termination date and the company does not have records substantiating any worked hours by you, the company shall;

- (i) Gratuitously pay your regular based salary earned and accrued to February 8, 2019, which totals GBP £39,682.54; and*

- (ii) *Reimburse you for expenses not to exceed GBP £10,000 (and which will exclude any legal expenses).*

Upon receipt of this signed Agreement (and any other obligations that you owe to the company, including to return company property) from you, the company shall issue payment forthwith by wire transfer and by no later than 5:00pm EST February 15 2019.”

13. There followed various correspondence between the Claimant and Mr Carroll by text and email regarding the matter of outstanding salary and expenses. The Claimant said that, despite the above assurances, the Respondent has made no payment to him in respect of his outstanding salary, untaken holiday and unpaid expenses.
14. Details of the sums claims, and how they were calculated were contained in the Claimant’s particulars of claim dated 16 April 2019 and also in a schedule of loss dated 31 May 2019. The basis for the sums claimed and the calculations, were also detailed in the Claimant’s witness statement given under oath at this hearing.

The Respondent’s Case

15. In the Respondent’s grounds of resistance dated 12 June 2019, and in Dr Bokhari’s witness statement given on oath at this hearing, the Respondent asserted that the Claimant was not entitled to the sums claimed because of his misrepresentation of his experience prior to employment with the Respondent, unsatisfactory performance of his duties as Chief Executive, failing to assume the position of Chief Executive in a meaningful way and failing to account for the total number of days that he worked during the period to which the claimed sums related.

16. The ET3 response included the following:

“It is admitted that between 5 January and 10 January 2019 the Claimant travelled to San Francisco, USA, together with travelling to Toronto, Canada between 15 and 17 January 2019 and 4 to 5 February 2019 to attend business meetings although the Claimant did not attend all meetings as required and/or the Claimant’s performance of his duties as CEO during these trips was below the standard required.

During the period between 1 January 2019 to 5 February 2019 the Claimant failed to demonstrate and/or account for the performance of his duties as CEO as required or at all. As a result, the Respondent is unable to determine that the Claimant performed any duties as CEO as required or at all. As a result, the Respondent is unable to determine that the Claimant performed any duties as CEO of the Respondent during this period.”

17. In Dr Bokhari’s witness statement he said:

“At pages 65a-65d there is a timesheet recording the days Rupert said he was working for FSD Pharma in December 2018 and

January 2019 provided by Rupert on 24 January 2019. I had instructed Rupert to provide this in an attempt to have oversight over the work he was performing. The timesheet records that Rupert worked during all working days in December 2018 and January 2019. However, I have no evidence of the work that Rupert was performing on those days, except for the days on which he was physically present at meetings with me, as detailed further at paragraph 36 below. ...

The only days on which I am able to verify that Rupert worked was on the days in which he was physically present for meetings outside of the UK (albeit his performance during those meetings was below the standards expected of a CEO). Otherwise I am unable to account for his whereabouts and his activities. The days on which Rupert was physically present for work are: 3 to 6 December 2018, 15 to 18 December 2018, 5 to 10 January 2019, 15 to 17 January 2019 and 5 February 2019. This brings his total working time to 18 working days”.

18. In respect of expenses, Dr Bokhari said that expenses claimed were not in line with the Respondent's expenses policies and were not incurred reasonably and properly because they exceeded the travel policy in force.
19. He also said that the Claimant had received the following payments:
 - 14 December 2019 £13,549 (This was said to be in respect of salary).
 - 24 December 2019 £34,291.94 (This was said to be in respect of salary).
 - 29 January 2019 £21,133.44 (This was said to be the reimbursement of expenses).
20. In respect of holiday pay, the Respondent said that it was not possible to verify the days when the Claimant was physically present and working except for the 18 days referred to above, and that no pay was due for outstanding holidays because the Respondent was unable to account for the Claimant's activities on anything other than the 18 days referred to above.

DECISION

21. Employment Rights Act 1996

Section 13

(1) An employer shall not make a deduction from wages of a worker employed by him unless -

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction. ...

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions) the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

22. The Claimant accepted that he had received the sums referred to by Dr Bokhari and Mr Carroll. He said that the £13,549 and £34,291.94 were in respect of wages and expenses, and the payment of £21,133.44 was in respect of expenses. However, he maintained that none of these payments related to the outstanding sums due for the period 1 January 2019 to 5 February 2019 which he was claiming in these proceedings.
23. The Claimant provide his calculations of the sums claimed and details of the periods to which the sums related.
24. By contrast, the Respondent did not produce any counter schedule of loss regarding these matters. There was only the assertions by Mr Carroll and Dr Bokhari that the Claimant had been paid the sums referred to above, which covered his salary, holiday pay and expenses and that he was not due any outstanding sums. The Respondent failed to produce any accounting records or pay slips to show what sums had been paid, when they were paid and to what period or matter any such payments related.
25. The Claimant claimed that he was working and performing his duties competently throughout the period of his employment. He denied that he was working only on those 18 days identified by Dr Bokhari. He provided, at Dr Bokhari's request, a detailed record of his activities on a daily basis throughout his employment. He also provided records of his claims for expenses which were submitted to the Respondent.
26. During the course of the hearing the Employment Judge made an order that the Respondent should provide a written schedule setting out the Respondent's position by way of a counter schedule in response to the Claimant's schedule of loss. That was ordered to be produced within 7 days, no later than 20 March 2020. No such counter schedule has been produced. Nor is there any documentary record of what the Respondent paid to the Claimant.
27. The Tribunal accepted the Claimant's account and preferred it over that of the Respondent which was unsupported by any documentary evidence. It was implausible that no such documentary evidence was available, bearing in mind the size of the sums involved.
28. Dr Bokhari's evidence was, in effect, that the Claimant could only expect payment for days on which Dr Bokhari was present with him, despite the fact that Dr Bokhari was mostly based in Canada and the Claimant mostly based in the UK.

29. Additionally, there was no reference in the letter of termination of employment dated 5 February 2019 to the assertion now made by the Respondent that the Claimant was not working days on days that he was not accompanied by Dr Bokhari.
30. As the Claimant said, there was nothing in his contract of employment that provided that any element of his basic annual salary, holiday pay or expenses was dependent upon his performance or attendance at any particular location.
31. The Tribunal was satisfied, based upon the Claimant's evidence and the documentation he had produced, and the Respondent's failure to provide documentation which could reasonably be expected to be produced in response to such claims, that the Claimant was entitled to be paid salary for the entire period of his employment. There was sufficient credible evidence that he had not been paid salary or pay for untaken holiday for the period 1 January 2019 to 5 February 2019. The expenses claim was supported by written expenses claims produced by the Claimant.
32. The claims were successful and judgment is entered accordingly.

I confirm that this is my Judgment in the case of Mr R Haynes v FSD Pharma Inc case no. 3314027/2019 and that I have dated the Judgment and signed by electronic signature.

Employment Judge Vowles

Date: 20 May 2020

Sent to the parties on:

.....28 July 2020.....

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For the Tribunals Office