



EMPLOYMENT TRIBUNALS

Claimant: MICHAEL WITHERSPOON

Respondent: THAMES VALLEY SPECIALIST PRODUCTS LIMITED

Heard at: Bristol Employment Tribunal

On: 11.12.2020

Before: Employment Judge David Hughes

Representation

Claimant: In person

Respondent: Mr François Moal

JUDGMENT having been sent to the parties on 19.12.2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Claimant was employed by the Respondent as a Development Manager from 08.09.2018 to, so the Claimant says, 31.12.2019. The Respondent is a small business that deals in chemical compounds for the maintenance of external surfaces, such as sports surfaces and building exteriors. It is not in dispute that the Claimant was employed by the Respondent, nor is his role in dispute, nor his salary.
2. The Claimant's case is that he was told, on 21.10.2019, that his job with the Respondent was going to end, that the Respondent's business model was no longer working. On 28.10.2019, he attended at the Respondent's office in Maidenhead, and there was a further conversation about the business. Mr Moal told him that he – Mr Moal – wanted to wind everything up by Christmas and retire. He told the Claimant to stop looking for new business, tidy up existing business, and to take time to look after himself – which the Claimant took to mean that he should start looking for a new job. The Claimant received a note "End of Employment" on 01.12.2019.

3. It is common ground that the Claimant did not receive a payment at the end of December 2019.
4. It is also common ground that the Claimant was paid the sum of £2,600 at some time towards the end of March/beginning of April 2019. In evidence and argument before me, it emerged that this was made at the end March rather than at the beginning of April.
5. The Claimant's claim is described in his ET1 as for notice pay. That is the box that he has ticked in s8 of the ET1. In box 8.2 of his ET1, he wrote that he was instructed by Mr François Moal that his employment would cease in December 2019, and that he would be paid up to Christmas. It goes on to say that the Claimant phoned Mr Moal between Christmas 2019 and the new year, and was told that what the Claimant refers to as an ex-gratia payment of £2,500 made to him at the end of March 2019 should now be considered his final leaving salary.
6. On reading the papers before the hearing, it seemed to me that the Claimant's case was not really about notice pay, but about an allegedly unlawful deduction from wages – in this case, the entirety of his wages for the month of December 2019. I raised this with the parties. The Claimant recognized that this was what the substance of his claim was about, and Mr Moal, frankly and to his credit, recognized that he had understood that to be what the case was about. As indicated, I had understood that to be the position from the facts stated in the ET1. It therefore seems to me that there is no prejudice in allowing any necessary amendment, applying the principles in Selkent Bus Company Ltd -v- Moore [1996] IRLR 661 [1996] I.C.R. 836. The ET1 is amended to read that the Claimant is owed arrears of pay.
7. I also asked the Respondent about his case. I did so because it seemed to me, from reading Part 7 of his ET3, that he was claiming in respect of alleged breaches of contractual terms imposing a duty of confidence, and not to engage in any other employment, consulting or other business, that would create a conflict of interest.
8. Clause V of the document setting out the terms and conditions of the Claimant's employment reads as follows:
V. Privacy and Confidentiality Agreements

You are required to observe and uphold all of the Company's privacy policies and procedures as implemented or varied from time to time. Collection, storage, access to and dissemination of employee personal information will be in accordance with privacy legislation.

Conflict of Interest

While you are employed by the Company, you will not engage in any other employment, consulting or other business activity (whether full-time or part-time) that would create a conflict of interest with the Company. By signing this letter of agreement, you confirm that you have no contractual commitments or other legal obligations that would prohibit you from performing your duties to the Company.

9. I was concerned that the Tribunal may be prevented from considering such a claim by Article 5 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994.
 10. Mr Moal clarified that the Respondent's claim. He said it was for an overpayment of £306 – which I will explain shortly – and for the repayment of what the Respondent asserts to be the December wages. The repayment is said to be due because the Respondent alleges that the Claimant breached his contract of employment. I will deal with the substance of this below.
 11. I raised with Mr Moal that this did not appear to be stated in box 7.3 of the ET3, indicating an Employer's Contractual Claim. He referred me to part 6 of the ET3. In that part, he wrote that the Claimant was fully remunerated with an extra payment over his regular salary until the end of December 2019. He also refers to an unused float advance of £715. The latter sum has been the subject of civil proceedings, and need not concern the Tribunal.
 12. I canvassed with the parties whether the Respondent should be permitted to amend its ET3, so that box 7.3 is read as incorporating the contents of section 6. The Claimant did not object to this. The matters of which the Respondent sought to rely were in the ET3, and it seems to me that there was no prejudice to any party in allowing the ET3 to be so amended.
 13. I heard argument and evidence from the Claimant in person, and from Mr Moal. Mr Moal is a director of the Respondent, and referred to the Respondent company and himself throughout the proceedings without distinction. Mr Moal is French. I asked him whether he would prefer to have an interpreter, but he said that he did not want one. He has lived in the UK for at least 30 years, and his command of English is such that I do not consider
- 10.8 Reasons – rule 62(3)

he was hampered in his ability to participate in the proceedings, to tell me what he wanted, or to understand what either the Claimant or I said.

14. I suggested that the key issue appeared to me to be, was the payment at the end of March 2019 a salary payment, or was it something else. If the payment in March 2019 is to be considered a salary payment, then it is agreed that it would represent an over-payment in the sum of £306. The Respondent would be entitled to deduct that from the Claimant's December 2019 wages, pursuant to s14(1)(a) of the Employment Rights Act 1996. It was agreed that the March payment was in the sum of £2,600, not the lower sum stated in the ET1. If it was not payment in respect of salary, then the Claimant has not been paid his salary for December 2019.

15. Whether that would entitle the Claimant to recover his salary for December 2019 requires further consideration. In the ET3, the Respondent disputes the date on which the Claimant's employment ended. The ET3 says that the Respondent disagrees with the dates because the Claimant breached his contract on 2nd December. The ET3 states that the Claimant's employment ended on 30.11.2019.

16. I do not accept this. Mr Moal clearly believes that the Claimant breached clause V of his contract of employment. Although the detail is not agreed, it is common ground that the Claimant contacted a supplier of the Respondent, said that he was calling from the Claimant's current employers, and made enquiries about a product in which the Respondent deals. Mr Moal considers that to be a breach of contract.

17. I do not think it is necessary for me to decide whether there was a breach of contract by the Claimant, and I am reluctant to do so because the Respondent, as I understand it, may take civil proceedings concerning the alleged breach in future. But the reason I do not think I have to decide it is this: although the Respondent may have been able to take action against the Claimant if it believed him to have breached his contract, Mr Moal's evidence was that it did not do so. No disciplinary process was initiated against him. It did not dismiss him. I find that the Claimant was employed by the Respondent until the end of December 2019, and was entitled to be paid for that month at his contractual rate.

18. I also note that the Respondent's ET3 invites me to treat an alleged breach of contract on 02.12.2019 as having brought the Claimant's employment to an end on 30.11.2019. I struggle to see that the alleged breach on 02.12.2019 could have caused the contract to end two days before the alleged breach is said to have occurred.

19. Before I move on, I note that, in his evidence, Mr Moal explained that the Respondent was experiencing difficulties with an on-line payroll system, which I think its accountant had urged on it. This led to the Claimant's salary not being paid at the end of March. In order that the Claimant not default on any direct debits, the Respondent made a payment of £2,600 to the Claimant.

20. Mr Moal told me that he had said that this payment was to be a permanent advance. He said that he was concerned that the payroll mishap may recur. The Claimant maintained that there was no mention of a permanent advance. He said that he did offer to return the money – Mr Moal agreed that he did offer to return it – but that Mr Moal told him to keep it.

21. On this point, I accept the evidence of the Claimant.

22. Although Mr Moal's attitude towards the Claimant has since changed, he seems to me to have been a generous employer. When the Claimant's driving licence was suspended for a short time, he permitted the Claimant to work from home, and on at least one occasion paid for the Claimant to travel to Liverpool by train for a business appointment. His concern over the payroll mishap, and his response to it, are consistent with a responsible and generous attitude. I think it more probable than not that Mr Moal did respond to the Claimant's offer to return the £2,600 by telling him to keep it.

23. I asked Mr Moal, when he gave evidence, whether the £2,600 was expressly said to be linked to any future salary. He said that it was not. He also said that no tax or national insurance was paid in respect of that payment.

24. I find that the payment of £2,600 was an ex gratia payment, made by the Respondent as an honourable gesture in response to the payroll mishap. I find that it did not represent an advance payment of any salary. As I have found that the Claimant was employed by the Respondent until the end of December 2019, I find that he is entitled to be paid his salary until that date. In my judgment, I ordered the Respondent to pay the Claimant the sum of £2,293, being the Claimant's net wages for December 2019.

25. S38 of the Employment Act 2002 is also relevant. The Claimant was provided with a written document setting out the terms and conditions of his employment, to which I have referred above, and a covering letter. But those documents do not comply with the 10.8 Reasons – rule 62(3)

requirements of s1(4) of the ERA 1996, in that they do not give particulars of the any terms and conditions relating to hours of work, sick leave, or any other benefits – in this case, the use of a company car. I asked Mr Moal about this, and he said that, insofar as time is concerned, the Claimant was a white collar worker, not paid to turn up and then go home.

26.I asked Mr Moal if there were any exceptional circumstances that would make it unjust or inequitable for me to award the minimum amount under s38. He could point to nothing.

27.I asked the Claimant whether there was anything he wished to say about whether he should be awarded a sum higher than the minimum amount awardable under s38. He said that there was not, that he just wanted his final month's salary. That attitude is generous, as Mr Moal's earlier behaviour to him had been. But s38(3)(a) requires me to make at least the minimum award of 2 weeks' gross pay, and that is the award that I make.

Employment Judge Hughes

Dated: 21 December 2020

Reasons sent to parties: 21 January 2021

FOR THE TRIBUNAL OFFICE