



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mr Ashley Keen

AND

Respondent
Vector Resourcing Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD VIRTUALLY AT Plymouth **ON** 06 August 2021

By Cloud Video Platform

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: Did Not Attend

For the Respondent: Mrs Grace Woolford, Commercial Director

JUDGMENT

The judgment of the tribunal is that the claimant succeeds in his claim for breach of contract and/or unlawful deduction from wages and the respondent is ordered to pay the claimant the gross sum of £2,750.00.

RESERVED REASONS

1. In this case the claimant Mr Ashley Keen brings a monetary claim which is expressed to be for breach of contract and/or an unlawful deduction from wages against his ex-employer Vector Resourcing Ltd. The respondent denies the claims.
2. I have heard from the claimant. The respondent applied for a postponement of the hearing this morning on the basis that there was no agreed bundle of documents between the parties, but I refused that application for a postponement and ordered the parties to forward by email any relevant documents and/or statements. Immediately before the hearing was due to commence both the claimant and the Tribunal office received an email from the respondent suggesting that the respondent had made contact with ACAS in the hope of reaching a settlement in the matter. There were no details of any such proposal. I therefore decided it was in the interests of justice to proceed on the basis of the documents before me, which included the claimant's evidence, and the relevant contemporaneous documents, and the respondent's grounds for resisting the claim in its response.

3. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to any factual and legal submissions made by and on behalf of the respective parties.
4. There is very little dispute about the background facts of this matter. The claimant asserts that he commenced employment with the respondent in 1998. The respondent asserts that the first 11 months were a probationary period only, and that the claimant's employment commenced in 1999. In any event, by the time of the events in question in 2020 the relationship between the parties was a long-standing and successful one, and the claimant was employed as a Recruitment Consultant and more recently as a Director of the respondent company. His normal salary was paid monthly, and the agreed rate was £2,750.00 gross per month.
5. During the summer of 2020 the claimant decided to resign his employment and to pursue other opportunities. The claimant had signed a contract of employment on 10 January 2003 and clause 12 of this contract required the claimant to give at least 12 weeks' notice of the termination of his employment. The claimant resigned his employment verbally on 26 June 2020, which he confirmed in writing on 29 June 2020. The claimant gave the respondent the required minimum 12 weeks' notice and it was agreed that his notice of resignation would expire on 30 September 2020.
6. Other relevant provisions in the contract of employment were as follows. Clause 1.3 provided: "You must devote the whole of your time and attention to the Company's business during the hours of work mentioned in clause 7 and must not, during the term of this agreement, without the prior written consent of the company, be directly engaged or concerned in any capacity in any other trade, business or occupation (always accepting that nothing in this clause shall prevent you becoming a registered holder of not more than 3% of any class of publicly quoted securities of any company).
7. Clause 1.4 provided: "Without prejudice to the generality of clause 1.3 you will not, without the prior written consent of the Company in competition with the business being carried on by the Company: 1.4.1 solicit or endeavour to entice away from the Company, accept orders from or have any business dealings with any Client; 1.4.2 solicit or endeavour to entice away from the Company or employee or procure the employment of any employee of the Company; 1.4.3 interfere with the supply of services or materials or goods to the Company by any Person."
8. The contract of employment also had a garden leave provision at clause 12.4 which read as follows: "Once notice of termination has been given by either side, the Company may, at any time and for any period(s), require you to stop performing your job and/or exclude you from attending its premises and/or assign you to special projects ("garden leave"). During any garden leave, the Company will provide your normal pay and benefits provided for in this agreement and you must remain available to undertake duties for the Company during your normal hours of work. During any garden leave, you will be deemed to have taken any holiday accrued but untaken before the beginning of the

garden leave and any holiday accruing during the garden leave. During any period of garden leave the obligations upon you in clauses 1.3 and 1.4 hereof will continue to apply. Without prejudice to the foregoing, if you receive any income from any alternative source during any period of garden leave, the Company will be entitled to set off against any salary otherwise due to you in respect of the garden leave period, any such income received by you.”

9. During September the claimant decided to continue with his resignation, and on 21 September 2020 he posted a message on his private LinkedIn account as follows: “After 22 fantastic years working with some exceptional colleagues and working for a great company, I have decided to leave Vector to embrace a new challenge. New Venture coming soon...”
10. On 21 September 2020 there was an exchange of emails between the claimant and Donna Medway, the respondent’s Managing Director, to this effect: “Good Morning Donna, I hope you and everyone in the team are well. Just confirming my exit from the business at the end of this month. Wishing everyone continued success. Best regards Ashley.” Mrs Medway replied: “Good morning Ashley. I confirm receipt of your email below, thank you. Grace will write you formally shortly. Surprisingly, a short while after I received your email I was made aware by a supplier that you had placed a post on LinkedIn stating that you have decided to leave Vector and are now promoting your “new venture”. Given that we originally had your agreed end date at 30th September (had you chosen not to return) we have plans in place to advise our clients and suppliers of your departure at that time, but unfortunately now you have publicised it, you have placed us in a difficult position. We have had to assume therefore that you have decided to reduce your notice period /gardening leave and the actual termination date was Friday 18 September. Kind regards. Donna.” The claimant replied: “Hi Donna, Nothing new sorted yet and certainly not before the end of the month. Just wanted to inform you of my decision not to return to Vector also still on garden leave until the end of September. I will look out for the formal email from Grace. Kind regards Ash.”
11. Grace Woolford, the commercial director, then wrote to the claimant on 23 September 2020 which letter was suggested to be Without Prejudice Save as to Costs. In short it complained that the claimant was in breach of the garden leave provisions and concluded on the basis of the claimant’s LinkedIn comment above that the claimant had decided to terminate his employment earlier than 30 September 2020 and that the claimant was in breach of the other restraints in his contract of employment.
12. The claimant acknowledged receipt of that letter, and he informed the respondent that he had to travel to Sussex to support his father who was having an operation. Mrs Woolford acknowledged that was fine and wished him well. On 25 September 2020 the claimant emailed Mrs Woolford to the effect that he had had “his hands full with family issues” and was taking advice on the respondent’s letter.
13. The respondent had paid the claimant’s normal pay for July and August 2020, but then failed to pay the £2,750.00 which was due for September 2020.

14. Other than the LinkedIn comment referred to above, the respondent has adduced no evidence that the claimant had resigned his employment before 30 September 2020, or that he was in breach of any of the restraint provisions in the contract of employment; or that he had received any alternative income from a third party. For the avoidance of doubt on the balance of probabilities I find that the claimant did not communicate any earlier resignation of his employment before 30 September 2020, nor that he had received any alternative income from any third party. In addition, I do not find that his LinkedIn comment amounts to solicitation of any prospective clients in breach of clause 1.4.1 of the contract of employment. It was merely a comment to the effect that his employment with the respondent would be ending soon and that at some stage he would be involved in a new venture. There was no specific solicitation of any clients.
15. It follows therefore that I find that the claimant was not in breach of his garden leave provisions or other provisions within his contract of employment, and the respondent had no justification for failing to pay him his normal salary of £2,750.00 for September 2020.
16. Having established the above facts, I now apply the law.
17. The claimant's claim for breach of contract is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order") and the claim was outstanding on the termination of employment.
18. The claimant alternatively claims in respect of a deduction from wages which he alleges was not authorised and was therefore an unlawful deduction from his wages contrary to section 13 of the Employment Rights Act 1996.
19. The respondent failed to pay the claimant's normal salary for September 2020 in the sum of £2,750.00. That was in breach of contract and was an unlawful deduction from his wages.
20. Accordingly, the claimant succeeds in his claim and the respondent is ordered to pay the claimant the gross sum of £2,750.00.

Employment Judge N J Roper
Date: 06 August 2021

Sent to the Parties: 16 August 2021

FOR THE TRIBUNAL OFFICE