



EMPLOYMENT TRIBUNALS

Claimant: Mr J Pilling

Respondent: ICSkills.com Limited

WRITTEN REASONS

Introduction

1. These are the written reasons for the Judgment delivered orally with reasons at the end of the hearing and sent to the parties on 15 February 2022.

2. The Claimant's case is that he was employed as an Associate Systems Developer by the respondent, had a contract of employment in place and the respondent should have been paying the claimant full wages from his start date 30 March 2020 up until the 8 June 2020 when his contract was terminated. He is claiming breach of contract and has submitted a schedule of loss for a compensatory award in the sum of £13,716. Alternatively, the claimant is seeking pay in lieu of notice as he never received any notice in the sum of £527.69.

3. The respondent contests the whole claim on the basis that the claimant was never an employee because the claimant never started work, never went through the induction process, and was never put on the payroll system.

Witnesses and Evidence

4. Neither party have been legally represented up to and including today.

5. The Tribunal heard from the claimant himself and for the respondent Mr Ian Dixon. There was a bundle of documents that ran to 121 pages. There were no witness statements.

Issues for the Tribunal to decide

6. An earlier hearing (Judgment on Reconsideration of strike out on 04 October 2020) helpfully identified a list of issues for the Tribunal to consider and these were as follows:

- (1) Was there ever a completed contract of employment?
- (2) If so, what were its terms as to when the claimant would start work?
- (3) If so, what were its terms as to whether the claimant would be entitled to be paid before he started work?
- (4) Was the claimant ready willing and able to start work on 30 March 2020?
- (5) If so, why did the claimant not start work?
- (6) What was the claimant's contractual status from 30 March 2020 to 8 June 2020?
- (7) Is the claimant entitled to be paid for that period?
- (8) Did the respondent terminate the contract of employment on 8 June 2020?
- (9) Did the respondent terminate the contract of employment before 8 June 2020 and if so, did it do so any earlier than 18 May 2020, so that the claimant's claim was presented out of time. If so, was it not reasonably practicable for the claimant to have presented the claim in time.
- (10) To what notice was the claimant entitled, and what, if any, notice pay is he entitled to?

Findings of Fact

7. There was an offer of employment that was made by the respondent, confirmed in the email of the 15 February 2020, and this was accepted by the claimant. There was consideration and there was an intention to create legal relations. It was clearly anticipated that the claimant was to be an employee of the respondent, but the start date of that employment is the issue that this judgment rests on.

8. It was agreed through various emails that employment would commence on 23 March 2020 and specifically in the contract of employment and the email dated 15 February 2020. It wasn't possible for the claimant to start on the 23 March 2020 as he was already working for somebody else, so the parties agreed that the start date was going to move to the 30 March 2020. This was confirmed in an email dated 18 February.

9. Lockdown due to covid commenced on the 23 March 2020. There was an email from the respondent to the claimant on 23 March 2020 advising it would not be possible to start on the 30 March due to the covid lockdown "*I have taken the step of putting most of my team on annual leave as from today. That leaves just essential staff to maintain rather than develop the platforms*". The email then goes on to state "*we will have to delay that until we have some clarity as to what happens next.*"

10. The claimant responded on the same day "*does that meant I won't be an employee of IC Skills until we agree a start date? Just wondering about my wage (whether it will or will not be paid by IC Skills as of the 30th- I'm assuming it won't*". The respondent replied "*... unfortunately, yes you are correct with your assumption – we would need to agree a new start date.*"

11. In giving oral evidence at the hearing both the claimant and the respondent said that they understood this to mean that the date that the claimant was to start employment had been indefinitely postponed.

12. Throughout March the claimant and respondent communicated via email and the Tribunal was advised they also used WhatsApp, but no evidence was presented regarding WhatsApp.

13. There were various emails between the parties regarding the furlough scheme and the respondent attempted to see if his employees could be classed as essential workers and whether the claimant could be put on the furlough scheme, but it wasn't possible. The respondent stated in an email dated 27 March 2020 to the claimant that furloughed employees must have been on the payroll on 28 February 2020 to be eligible for the scheme.

14. The respondent communicated to the claimant via email on 17 April 2020 "the split second we get over this purgatory is the split second you join us".

15. No evidence was presented to the Tribunal regarding any terms that were agreed as to what the claimant was to be paid before he started work. The contract of employment was silent on this point.

16. The claimant and respondent agreed that there had been no communication between them at all during the month of May.

17. The claimant gave oral evidence that he had no idea that the indefinite start date had been cancelled until he received the email from the recruitment agent on the 8 June 2020. The claimant then emailed the respondent to get further confirmation on the 12 June. No reply was received until August.

18. The respondent gave oral evidence that he had not expressly told the claimant that the start date was no longer on hold, he hadn't told the claimant that there was to be no start date, because the respondent was in fact making employees redundant at that time.

19. The claimant gave oral evidence that he had not chased the respondent for the wages he believed was due because "he was treading on eggshells".

20. The respondent gave evidence to the Tribunal that the recruitment agent normally sends in an invoice as soon as the employee he has put forward has commenced employment. The invoice had been sent to the respondent but had been rejected on the basis that employment had not actually commenced and this was accepted by the agent.

21. The respondent stated that the claimant had never been through the day one induction process. Day one on site at the respondent's offices induction process involved: meeting the rest of the team, being put on payroll, learning what the protocols were, reading the data protection policies etc. He also advised that all employees signed their contract and commenced employment on the first day that they arrive on site.

22.The notice pay as per the claimant's contract of employment is stated to be one week.

23.The claimant's claim was presented to the Tribunal on 10 October 2020. The claimant notified ACAS under the Early Conciliation Procedure on 18 August 2020 and the ACAS Early Conciliation Certificate was issued on 16 September 2020.

Relevant Law

Breach of contract for notice pay

24. An employer will be in breach of contract if they terminate an employee's contract without the contractual notice to which the employee is entitled, unless the employee has committed a fundamental breach of contract which would entitle the employer to dismiss without notice.

25. The principles by which a contractual term should be interpreted were set out by Lord Hoffmann in **Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896** as follows:

"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.

26. That approach was restated by the Supreme Court in **Wood v Capita Insurance Services Ltd [2017] UKSC 24** in paragraphs 10-13 of the judgment of Lord Hodge.

27. Terms can be implied into a contract by statute, by common law (such as the implied obligation of trust and confidence) or because the term implied is one which the parties must have intended even though it was not expressed. There are various tests for such an implied term, including the "officious bystander" test and the test of business efficacy, but they are all means to establishing what the contract, read as a whole against the relevant background, would reasonably be understood to mean: Lord Hoffmann in **Attorney General v Belize Telecom Ltd and Anr [2009] 1 WLR 1988**, at paragraphs 21-27.

28. A claim for breach of contract must be presented within three months beginning with the effective date of termination (subject to any extension because of the effect of early conciliation) unless it was not reasonably practicable to do so, in which case it must be submitted within what the Tribunal considers a reasonable period thereafter.
29. The aim of damages for breach of contract is to put the claimant in the position they would have been in had the contract been performed in accordance with its terms. Damages for breach of contract are, therefore, calculated on a net basis, but may need to be grossed up to take account of any tax and national insurance that may be payable on the damages. Damages relating to notice pay are subject to tax and national insurance.

Conclusions

30. In deciding the issues, the Tribunal has not set out all the evidence heard at the hearing on 21 January but has selected those details which are most important to the decisions. Just because something is not mentioned does not mean the Tribunal did not consider it.
31. Considering all the evidence heard the Tribunal concludes that although there was a contract of employment, no start date had ever been agreed for the employment under that contract to begin. It had been indefinitely postponed by agreement between the parties.
32. Looking specifically at the issues:
 - (1) *Was there ever a completed contract of employment?* - yes it was clear to the Tribunal that an offer had been made and accepted and a contract had been sent to the claimant by the respondent via email 15 February 2020 and this was in place from 30 March to 8 June 2020.
 - (2) *If so, what were its terms as to when the claimant would start work?* – the Tribunal found via various emails this had been changed from 23 March to 30 March and then postponed indefinitely due to lockdown which commenced on 23 March 2020. This had been agreed between the parties in these emails. The respondent had tried to see if the claimant could be put on the furlough scheme, but this wasn't possible. The Tribunal concludes that the intention of both parties was there was going to be a start date at some indefinite time in the future.
 - (3) *If so, what were its terms as to whether the claimant would be entitled to be paid before he actually started work?* - the Tribunal could find no evidence as to what the claimant should be paid before he actually started work.
 - (4) *Was the claimant ready willing and able to start work on 30 March 2020?* - the Tribunal finds that the claimant was ready to start work on the 30 March but an email from the respondent on 24 March advised the claimant that it was not possible for the claimant to start on the 30 March.

- (5) *If so, why did the claimant not start work?* - the Tribunal found that the claimant could not start work because of covid, the claimant's work could not be done from home and there was no agreed start date so he couldn't be considered a working employee.
- (6) *What was the claimant's contractual status from 30 March 2020 to 8 June 2020?* - The Tribunal finds that employment had not commenced for the following reasons: the respondent had rejected the invoice from the recruitment agent on basis that employment had not commenced, this has been accepted by the agent, the claimant had not been put through the induction process ie meeting the rest of the team, being put on payroll, learning what the protocols were, reading the data protection policies etc. The respondent also advised that all employees signed their contract and commenced employment on the first day that they arrived on site. The contractual status of the claimant was in limbo as no start date had been agreed.
- (7) *Is the claimant entitled to be paid for that period?* - the Tribunal finds on the evidence no, because no start date had been agreed. Although the claimant was available, he didn't attend the offices, he didn't work from home, the contract was to provide services to the respondent in return for a salary, but the start date was not agreed and in fact the start date had been postponed indefinitely.
- (8) *Did the respondent terminate the contract of employment on 8 June 2020?* - the first the claimant knew the start date was cancelled was on 8 June 2020 from the recruitment agent and the Tribunal finds that the respondent had never communicated this to the claimant. The respondent says he was busy making other employees redundant at that time.
- (9) *Did the respondent terminate the contract of employment before 8 June 2020 and if so, did it do so any earlier than 18 May 2020, so that the claimant's claim was presented out of time. If so, was it not reasonably practicable for the claimant to have presented the claim in time?* - the Tribunal took the view that this does not need to be considered as all the evidence presented indicated that the cancellation of the start date of the contract was only made known to the claimant on the 8 June 2020 and therefore the claimant's claim was presented in time.
- (10) *To what notice was the claimant entitled, and what, if any, notice pay is he entitled to?* - The evidence presented to the Tribunal as per the contract of employment states the applicable notice pay would be one week. However, as employment had not yet commenced, because the parties had varied the start date of that contract from 23 March 2020 to the 30 March 2020, and then indefinitely, the Tribunal finds that there can therefore be no wages due to the claimant, because he had not started employment. No services had been provided by the claimant because performance had been delayed by both parties. Further the claimant has no loss because he had not yet commenced employment, as no date for that had been agreed, and the employee is not generally entitled to any benefits before, he starts work.

33. The Tribunal is of the view that even if the respondent had given the claimant a week's notice of termination, the contract of employment would still have ended before any right to be paid had arisen. Therefore, no financial loss was suffered.

Employment Judge Dennehy

Date 11 March 2022

REASONS SENT TO THE PARTIES ON

17 March 2022

FOR THE TRIBUNAL OFFICE