EMPLOYMENT TRIBUNALS

Heard at:	Croydon (by video)	On: 13 October 2022
Claimant:	Mr Adam Collett	
Respondent:	London Security Automation Limited	
Before:	Employment Judge E Fowell	
Representation:		
Claimant	Ms Bryony Clayton of counsel, instructed by Tom Street & Co.	
Respondent	Mr Lee Bronze of counsel, instructed by Punter Southall Law	

JUDGMENT

1. The claimant's dismissal was unfair and he is awarded compensation of £4,946.81 comprising:

   (a) a basic award of £4,304

   (b) a compensatory award comprising one week's pay of £514.25; and (c) an

   uplift for failure to comply with the ACAS Code of Practice of £128.56

2. The dismissal was not in breach of contract.

3. The complaint of failure to pay annual holiday is upheld and the claimant is awardedcompensation of £25,027.52.

4. The complaint of arrears of wages is dismissed.

5. The employers contract claim is upheld and the employer is awarded £4,310,comprising:

   (a) £200 loan repayment; and

   (b) £4,110 for damages to business.

6. The net sum due to the claimant is £25,664.33

REASONS

Introduction

1. These written reasons are provided at the request of the respondent following oral reasons given earlier today.

2. This is the second substantive hearing of this matter. The first was a two day hearing on 11 and 12 July 2022, which determined that Mr Collett was an employee. In the written reasons which followed, I explained that LSA is a small family business run by Mr Pheby, with a group of several engineers who spend their time visiting clients and carrying out installations and maintenance of security equipment, and that one of their customers was Caledonian Residents Management Limited (Caledonian). Mr Collett was the only one of the engineers who was regarded, wrongly, as selfemployed. His dismissal came about when it became apparent to Mr Pheby that Mr Collett had been doing work privately for Caledonian and, as I will explain shortly, in competition with them.

3. As before, the complaints presented are of:

   (a) unfair dismissal;

   (b) breach of contract in relation to notice pay;

   (c) unlawful deduction from wages;

   (d) breach of contract / breach of the Working Time Regulations 1998 in relation to outstanding holiday pay.

4. The company brings a counterclaim, alleging that they lost revenue as a result of his competing work, in particular that they lost their contract with Caledonian.

Procedure and evidence

5. There was an application this morning by Mr Bronze for further orders to obtain evidence about the extent of Mr Collet's activities for Caledonian. A witness statement was provided by Mr Christopher Sowden, a director at Caledonian, supporting the respondent's case. However, he was reluctant to supply copies of all the invoices presented by Mr Collett to Caledonian because Mr Collett has threatened that this would be a breach of the GDPR regulations. Accordingly, he was not prepared to give evidence or provide that documentary evidence without an order from the Tribunal. Mr Bronze accepted that Mr Sowdon was not available today and so on any view this would lead to a further adjournment.

6. I refused the applications, which had only been made in the last week or so. At the last hearing in July, Mr Collett was directed to make a thorough search for any additional invoices beyond the 5 or 6 which he had disclosed, and he said that he was unable to find any more, which I accepted. The respondent had been pressing for disclosure of the additional information before that hearing, so it was a live issue. A previous application for specific disclosure

against Mr Collett had been refused by the Tribunal. It was still open to the respondent to make an application for disclosure by Caledonian and no real explanation has been given as to why they did not do so until shortly before this adjourned hearing.

7. Given that the application would inevitably lead to an adjournment, in a case which has been going on for over two years now, I took the view that it was not in accordance with the overriding objective to allow either application.

Evidence

8. Once again, I heard evidence from Error! Reference source not found. Error! Reference source not found. and Mr Bingham, the former building manager at Caledonian, who awarded various small contracts to Mr Collett, and on behalf of the company from Mr Pheby.

9. There was also some further documentation, unfortunately not collected together in one overall bundle, but the various batches have been paginated so individual items can be identified.

The obligations on Mr Collett as an employee

10. Having found that Mr Collett was in reality an employee, the next task is to identify the relevant terms of his employment. Just because the company had some engineers with contracts of employment, it does not follow that those terms would automatically apply to Mr Collett. He would not necessarily have been aware of them, let alone agreed to them. That is particularly so with terms search as restrictive covenants and the like.

11. But there were some restrictions in Mr Collett's self-employed contract. Again, just because I have concluded that he was in reality an employee, it does not follow that those terms can be disregarded. One of the reasons for concluding that he had employment status that he was subject to a high degree of control by the employer, as demonstrated by some of the terms of the contract.

12. In particular, there were restrictions at paragraph 4, which set out his duties. They included providing his services to the best of his ability, complying at all times with the company's rules on confidentiality and other matters, and

> "not to undertake any additional activities or accept any other engagements that lead or might lead to any conflict of interest between [him] and the best interests of the Company."

13. Those last words are relied on by Mr Collett as showing that he was not in breach of contract because he was only required to avoid a conflict with the company. LSA had a maintenance contract with Caledonian, requiring them to carry out a bi-annual inspection, rather like an MOT, and he was not competing for that contract; he was just doing occasional extra jobs for them, repairing damage or installing new equipment.

14. At section 11 of his contract there are further restrictions, including clauses about non-solicitation and confidentiality. They provide that after the end of his employment he cannot

solicit customers or reveal confidential commercial information. I am not concerned with such post-termination clauses, but they ought to have indicated to Mr Collett that there were obligations on him regarding competition and misuse of company information, or at least that the company took that view.

15. Regardless of what was in the contract, it is well established that employees owe a duty of loyalty and good faith to their employer. This duty continues imposes an obligation on the employee to provide honest, loyal and faithful service. Hence, among other things, an employee must not compete with his employer or make secret profits from his employment. No cases were cited to me for this basic proposition, which is supported by long authority, but I will mention one. In Wessex Dairies Ltd v Smith 1935 2 KB 80, the Court of Appeal held that employee is employed to look after the interests of the employer, not his or her own individual interests. In that case Mr Smith was a milkman who, on his final day of employment, informed customers that he had set up his own business and would be able to supply them with milk in the future. He was held to have breached his implied duty of fidelity and so was liable in damages. Any such competition with an employer, even on the last day of work, is a fundamental breach of contract.

Breach of Contract

16. Here there is very little dispute about the relevant facts, and although there is a lack of information to establish the full picture, a number of examples were given by Mr Pheby in his witness statement:

    (a) On 30 September 2019, Mr Collett went to visit Caledonian and identified that the traffic barrier on site was not responding to transmitters (page 221). He took one and a half hours to inspect things. The next day LSA sent a fee proposal to Caledonian for the cost of repairing the barrier, based on this assessment - £220 plus VAT (page 222). But on 16 November 2019, Mr Collett carried out that same work in his personal capacity, charging £150 (page 223). This is therefore an example of his winning business in competition with LSA. He was only in a position to bid for the work because he worked for LSA and he had the advantage of having spent one and a half hours on site at LSA's expense before submitting his bid.

    (b) On 20 December 2019 LSA submitted an invoice for work done repairing damage caused by squirrels having eaten the cable on top of a main gate (page 229). But Mr Collett also submitted an invoice for the same work, on 13 January 2020 (page 230). (There was no explanation from Mr Collett as to how this came about, but if the work was done by LSA on 20 December it is hard to see what there was for Mr Collett to do a few weeks later.)

    (c) Previously, on 3 November 2019, LSA had provided another quote to repair squirrel damage. This time they had cut through a cable connecting two CCTV cameras on site, and the quote was for over £1,000. This work was also in fact carried out by Mr Collett, and is covered by two of his invoices at pages 226 and 227. In each case, his quote was a little less than that of LSA.

17. These are the most obvious examples of Mr Collett winning business which had been tendered for by LSA, but there are ten invoices in total which have been disclosed by him in a numerical sequence going up to number 21.

18. At no time did Mr Collett ever mention to Mr Pheby that he was carrying on in this way and quoting privately for such work.

19. Mr Bingham's evidence, (the former Building Manager at Caledonian) was that he approached Mr Collett and asked him to put in his own bid, on the basis that he knew that Mr Collett was self-employed, but it is still hard to understand how Mr Bingham thought that was appropriate in the circumstances.

20. In any event, these are clear examples which suffice to show that Mr Collett was in clear breach of the duty of loyalty and good faith. That is a fundamental term of the contract and so any breach of that duty is a fundamental breach of contract and entitles the employer to dismiss.

21. That dismissal came by an undated letter from Mr Pheby in May 2020 (page 121), simply stating that "it has come to our attention that you have been providing services for [Caledonian] outside of the Contract for Services Agreement." It went on to quote from clause 4 of the agreement setting out his duties.

22. On 28 January 2021, once these proceedings were underway, an e-mail was provided by Caledonian to Mr Pheby (page 122). It is not from a named individual and comes from a general building management e-mail address. The author states that he wrote following Mr Pheby's request for reasons why they were no longer using LSA, and it confirmed that they had carried out an investigation and found that business invoices had been submitted by both LSA and Mr Collett. There were also concerned that these invoices were for work that should have been provided under the existing contract and that the number of call outs was surprisingly large.

Conclusions

Unfair Dismissal

23. This was seen by the company as gross misconduct. Mr Collett gave evidence that he had already been stood down because of COVID and suggested that his employment was brought to an end in this way because he had become redundant, but I accept that it was a genuine response to discovering that Mr Collett was working in competition with LSA.

24. The traditional tests for a fair dismissal on grounds of misconduct require:

    (a) a genuine belief on Mr Pheby's part that Mr Collett did what was alleged;

    (b) that he formed that view on reasonable grounds;

    (c) after as much investigation as was reasonable in the circumstances; and

(d) the decision to dismiss was within the range of reasonable responses open to an employer in the circumstances.

25. In fact, as just noted, since Mr Pheby regarded or chose to treat Mr Collett as selfemployed, he simply dismissed him by letter. Nevertheless I am satisfied that he had an honest belief in his guilt, based on the information he had at that time, and that dismissal was within the range of reasonable responses. It is just the reasonableness of the investigation and the process which is called into question.

26. In Polkey v AE Dayton Services Ltd [1987] UKHL 8 the House of Lords confirmed that procedural fairness is an integral part of the reasonableness test, and the tribunal is not permitted to ask whether a particular step it would have made any difference to the outcome: that may be relevant to the issue of compensation but not to whether the dismissal was fair.

27. It seems to me inevitable that Mr Collett would have been dismissed had a fair procedure being followed. We have now had the benefit several days of evidence on this matter, and although not all of the invoices are available, it is clear from those we have that Mr Collett was working in competition with the company. There is really no excuse or justification that he could have offered, save that he was not aware that this was not permitted. Given the fundamental nature of the duty, that would not have taken matters any further.

28. All this is somewhat hypothetical. Mr Collett thought that he was justified in competing because he was regarded as self-employed. Had he been regarded as employed, and regarded himself in that light, it is difficult to see how he would have carried on in the same way. But had a disciplinary hearing taken place with Mr Pheby in those hypothetical circumstances, there is nothing really he could have offered in his own defence. It was clear from Mr Pheby's evidence that he was shocked and amazed to find out about this, and in the circumstances this is a case in which I can be 100% satisfied that dismissal would have resulted.

29. One further point I should mention is that Mr Collett suggested that the e-mail from Caledonian at page 122 was perhaps not genuine and had been concocted to justify his dismissal. I am satisfied that that is not the case. It may have been produced on request for Mr Pheby, but the underlying facts are now well established.

30. However, there is an expectation of a fair procedure which would have involved a disciplinary meeting. It was put by Mr Bronze that this would have taken about a week to conclude and I accept that suggestion. It seems to me that Mr Collett could have been asked within a day or two whether there was any truth in these rumours or accusations that he was working competition with Caledonian and in that hypothetical scenario he would of course have been obliged to tell the truth. From that point on, little no additional investigation would have been required, and a disciplinary hearing could have been convened within a few more days. Hence, I allow damages of one week's pay for the compensatory award. That has to be uplifted by 25% to reflect the wholesale failure to comply with the ACAS Code of Practise, in particular the failures to hold a meeting or at any stage to ask Mr Collett for a response.

31. The amount of a week's pay was agreed in the sum of £514.25, and so the 25% uplift adds a further £128.56

32. The basic award was agreed in the sum of £4,304. This is not a straight forward calculation in circumstances where some estimation made of the exact dates of employment, and I am grateful to the parties.

33. I make no deduction from that amount to reflect Mr Collette's conduct on just and equitable grounds, as allowed by section 122 Employment Rights Act. Although that question can be assessed in light of what we now know, rather than what was known at the time, the purpose of the basic award is to reflect the loss of their job security, rather than financial compensation for the dismissal itself. It is well established that even in cases where an employee suffers no financial loss from a dismissal they are entitled to receive a basic award, and I also accept that Mr Collett, unhappy at being treated as self-employed, felt that he was entitled to compete in this way with LSA.

Breach of contract in relation to notice pay

34. Given that Mr Collett was in breach of contract, his claim for notice pay must be dismissed.

Unlawful deduction from wages under section 13 Employment Rights Act;

35. Similarly, his claim for unlawful deduction from wages was not pursued, and that too is dismissed.

Holiday

36. As noted in the previous judgment, applying the recent authority of Smith v Pimlico Plumbers [2022] EWCA Civ 70 no time limit or other issue arises to prevent Mr Collett being awarded his holiday pay for the entire duration of his service. Again, I am grateful to the parties for having agreed an overall figure reflecting his eight years or so of service, in the sum of £25,027.52.

Employers contract claim

37. The main item of disagreement was over the employers contract claim. This was initially set out in the grounds of resistance (page 33) as a claim for repayment of a £200 loan made to Mr Collett and for £4,110 representing the sum total of 24 invoices submitted to Caledonian. Unfortunately there were a number of errors in this pleaded case. Mr Bronze accepts that there were never 24 invoices. There are only 10, of which the last is numbered 21. And they do not amount to £4,110. The total is a little over £3000. I will return to that aspect.

38. Subsequently this pleading was amended and a further claim was added (page 43) for damages to the business caused by the loss of the maintenance contract with Caledonian. The value of this loss was pleaded at a little over £10,000 a year and two years loss was claimed.

39. It was accepted by the respondent that there was insufficient evidence to accurately quantify the loss caused by the cancellation of that contract. I was urged to adjourn this hearing again, to allow them to provide that further evidence. However, I took the view that it was for the respondent to prove its case on these points and that there had been ample opportunity already. In fact, although these proceedings have been on foot for about two years it does not seem that anything has been done to progress that aspect, leaving a difficult assessment at the conclusion of the hearing today.

40. Mr Collett accepted that the £200 loan was outstanding, and so that is awarded.

41. As to the total value of the invoices in question there are a number of difficulties. In the first place we only have about half of the total number submitted. As already noted, an application could have been made to obtain those invoices from Caledonian in time for this hearing, but that was not done.

42. In any event, the invoices submitted by Mr Collett to Caledonian are a very rough guide to their losses. Many are of modest value, for labour only, while some are of much greater size and include items of equipment such as cameras purchased for the customer. Then there is the question of what cost would have been incurred by

    LSA if they had provided the services in question. It is only their profit which can be recovered.

43. On the other hand, the respondent has at least specified a figure and a methodology for its counterclaim and there has been nothing in response until the very final stage of this hearing when it was noted that the existing invoices do not amount to the stated total. On that slender and unsatisfactory basis, mindful of the fact that there are other invoices which have not been produced, I am prepared to allow the employees contract claim in the sum stated.

44. I am not however prepared to go beyond that and assess damages for the loss of the maintenance contract. Very little information has been provided about this. The contract itself has the value blanked out so it cannot be read. Its main value to the respondent appears to be that, surprisingly often, additional repair and maintenance work was required for which they could invoice separately. However, there was evidence from Mr Baldwin that he was obtained three quotes for the work in question and so there is no certainty that any particular item of work would be awarded to LSA. And once again, it would be an accounting exercise to assess how much of those charges would be profit and how much would be down to equipment or other overheads. What is clear is that the sums claimed would represent a considerable overestimate. The maintenance contract itself only had another six months to run and might not have been renewed for other reasons. Taking those factors together, the exercise is altogether too speculative and there has been a failure by the respondent to prove their case on the balance of probabilities.

Statement of employment particulars

45. As a footnote, there is power to award additional compensation where an employer has failed to provide a statement of employment particulars. That should be between an award of two to four weeks' pay unless exceptional circumstances apply. It seems to me that there are such exceptional circumstances here, given that Mr Collett was competing with the employer and disregarding those obligations and so I make no separate award on those grounds.

Employment Judge Fowell
Date: 13 October 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON
01 November 2022

For the Tribunal Office

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Deenisha Rekhi