



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondent

Mr F Algate

The Lymden Group Ltd

REASONS FOR THE JUDGMENT GIVEN ORALLY ON 26 SEPTEMBER 2023

Introduction

1 These reasons are given in writing pursuant to a written request by the Claimant delivered to the Tribunal on 9 October 2023.

2 The Respondent is a small consultancy company which provides IT and analogous services, almost exclusively to government bodies with interests in the defence and security sectors.

3 The Claimant was continuously employed by the Respondent in the capacity of Management Consultant from 13 December 2021 until 26 September 2022, when he was summarily dismissed, purportedly for 'gross misconduct', namely sharing confidential information for his own benefit or that of a third party by directing candidates who had applied to the Respondent through recruitment exercises towards a 'key competitor' (see the letter of dismissal of 26 September 2022).

4 By his claim form presented 7 November 2022, the Claimant brought a complaint of wrongful dismissal, claiming compensation based on a contractual notice period of two months.

5 In its response form, the Respondent disputed the claim, contending that, in light of his conduct, the Claimant had not been entitled to any notice of dismissal and that, in any event, his notice entitlement had been limited to one week because he had been dismissed during the currency of his probationary period, which had been extended beyond the standard six-month period.

6 The matter came before me for hearing on 26 September 2023, the first anniversary of the dismissal. The Claimant appeared in person; Mr Douglas Leach, counsel, represented the Respondent.

7 Strictly speaking, the case was listed for determination of preliminary issues but the parties were agreed that my decision on those issues would necessarily

determine the claim as a whole, and accordingly I proceeded by consent on the basis that I should treat the matter as a final hearing of all issues of liability and remedy.

8 I heard oral evidence from the Claimant and Mr Matthew Robertson, the Managing Director of the Respondent and the person who took the decision to dismiss. Both gave evidence by means of witness statements, Mr Robertson's running to 25 pages. In addition to live evidence, the Claimant tendered supporting statements in the names of two individuals, Mr Mark Stanbury and Mr Richard Ellis, which I read for what they were worth. I was also presented with a bundle of 239 pages, Mr Leach's skeleton argument and a sheaf of legal authorities. I could not help remarking that the lengths to which the Respondent had gone to resist the Claimant's simple claim to assert his right to notice appeared to be absurdly disproportionate to the straightforward questions which arose.

9 The applicable legal framework was not in dispute. It was not in question (not could it be) that the Claimant was in principle entitled to notice of dismissal. Liability for his claim could be resisted only if the Respondent could demonstrate that, by his conduct, he had repudiated his contract of employment and thereby deprived himself of the right to rely on its terms as to notice. Repudiation is a powerful word. It refers to a metaphorical tearing-up of the contract. What must be proved is a breach of a term that goes to the heart of the contract. Such a term may be express or implied. The courts have long acknowledged that contracts of employment are subject to an implied duty on both sides to preserve mutual trust and confidence. A party relying on the duty must establish conduct by the other party calculated or likely to destroy or seriously harm the relationship of mutual trust and confidence (*Malik v BCCI* [1998] AC 20 HL). The bar is set high.

The key facts

10 Having heard the evidence of the witnesses, read the documents to which I was referred and listened to the submissions of Mr Leach (I did not find it necessary to hear closing argument from the Claimant), I arrived at the following findings of fact on a balance of probabilities. I did not have great difficulty in doing so. My findings were entirely consistent with the documentary materials before me. In so far as it was necessary to weigh credibility, the Claimant impressed me as a frank and entirely plausible witness. I cannot say the same for Mr Robertson.

Contractual terms

11 The Claimant's contract of employment provided (cl 4.1) that the first six months of his employment would be a probationary period. Cl 4.2 stated: 'If the Employer is not satisfied with your performance and conduct during the Probationary Period, it may at its discretion extend the Probationary Period.' By cl 4.3 it is provided that: 'Reference to the Probationary period in this contract includes any extension of it under this clause. If your Probationary Period is extended in accordance with this clause, you will receive confirmation of the extension'. The notice entitlement during the Probationary Period (after the first month of service) was limited to one week (cl 4.4). Outside the Probationary Period, the contract provided for two months' notice (cl 16.1), without prejudice to

the Respondent's right to terminate without notice in a case of gross misconduct justifying summary dismissal (cl 16.2).

12 The contract refers to the Respondent's disciplinary rules and procedures, but explicitly states that they do not form part of the contract (cl12.1).

13 The Respondent placed reliance on cl 17.3 of the contract, located in the section headed 'Confidential information & company property', which states: 'Except in the proper performance of your duties (or as required by law), you will not, either during your employment or at any time after the termination of your employment, without the prior written approval of the Employer use Confidential Information for your own benefit or for the benefit of any other person, firm, company or organisation (other than the Employer), or directly or indirectly disclose Confidential Information to any person (other than any person employed by the Employer whose province it is to have access to that Confidential Information).

Facts relating to the Claimant's conduct

14 The conduct ultimately relied upon as justifying the Claimant's summary dismissal was confined to his dealings with two individuals in or around the summer of 2022. Both were contacts of his through what he calls the 'ex-military network' and were interested in obtaining work in the defence/security sector. One, 'RE' had a 'coffee and a chat' in July 2022 with Mr Robertson and another director, with a view to possible employment, but after an interval the Claimant was told that the Respondent was not interested in him. The Claimant passed the CV of the other, 'JB', to the Respondent but was told soon afterwards that the company was not interested in him either.

15 The Respondent was clear and unambiguous with regard to both individuals. Neither Mr Robertson nor anyone else on behalf of the company expressed a glimmer of interest in either candidate. Nor did anyone with authority in the Respondent say or suggest that either might at some future point be regarded as a potential candidate for employment. Nor was it said or suggested to the Claimant that either individual should (for any reason) be kept 'warm' (ie be given to think that any employment opportunity for which he might be suitable was liable to arise in the foreseeable future) or that lines of communication between him and the company should (for any other reason) be kept open.

16 The Claimant pointed RE and JB towards another company trading in the defence/security sector, but he did so only after the Respondent had made it abundantly clear that it had no interest in considering either for recruitment.

17 I am entirely satisfied that, in doing so, the Claimant did not believe or suspect that there was any possibility of compromising or prejudicing the interests of the Respondent. He did not act furtively. He did not act in bad faith. Moreover, I reject Mr Robertson's opportunistic evidence before me seeking to show any such prejudice.

Facts relating to the Probationary Period

18 In accordance with the Claimant's contract of employment, cl 4.1, his Probationary Period was to run for six months from the commencement of his service, namely 13 December 2021.

19 The Respondent did not extend the Probationary Period 'during the Probationary Period', in accordance with cl 4.2 Nor did he purport to do so thereafter.

20 It necessarily follows that the Probationary Period ended on 12 June 2021.

21 I do not consider it necessary to make any finding as to whether Mr Robertson contemplated or proposed an extension of the Probationary Period, in circumstances where no such extension was effected.

Secondary findings and conclusions

22 On my primary findings, only one outcome is possible. The Claimant committed no breach of any term of his contract, express or implied, let alone a repudiatory breach. No remotely arguable grounds for denying him his rights to notice (or compensation in lieu) is shown or was ever capable of being shown.

23 In respect of remedy, the Claimant is entitled to compensation based on his notice entitlement of two months. There was obviously no arguable basis for limiting the right to one week. That was inevitable given that the Probationary Period had run its full course without being extended.

24 Mercifully, even this Respondent did not attempt to summon up any further challenge in respect of remedy and my award was agreed (as a figure).

25 This case reflects very poorly on Mr Robertson and his organisation. He would do well to learn lessons from it. He was a less than candid witness. Perhaps more troubling to me was the fact that he seemed impervious to the injustice liable to be suffered by any employee falsely accused of 'gross misconduct'. The fair-minded and reasonable employer will avoid attaching that damaging label to a dismissal unless cogent grounds exist for doing so.

EMPLOYMENT JUDGE – Snelson
17/11/2023

Reasons entered in the Register and copies sent to the parties on: 17/11/2023

.....

For Office of the Tribunals