



THE EMPLOYMENT TRIBUNAL

SITTING AT: London South Employment Tribunal

BEFORE: EMPLOYMENT JUDGE MARTIN

BETWEEN: Mr Malcolm Henderson Claimant

and

PB Structural Engineering Ltd Respondent

ON: 14 January 2020

APPEARANCES:

For the Claimant: In person

For the Respondent: Mrs P Callaghan - Director

JUDGMENT

The judgment of the Tribunal is that the Claimant's claim is dismissed and the Respondent's counterclaim is dismissed.

REASONS

1. The Claimant brought a claim alleging breach of contract/unauthorised deductions from wages in relation to bonus payments. The Respondent counterclaimed alleging that the Claimant had breached various implied terms of his contract of employment.
2. The Claimant is a structural engineer who has been a director of a company in the past and also set up and ran his own structural engineering company.

3. The Respondent is a company which has one director.
4. The Claimant wanted to close his company in the run up to his retirement and from 1 January 2018 to 1 July 2018 had an arrangement with the Respondent whereby he would work under the umbrella of the Respondent's company being paid an hourly rate. From 1 July 2018 the Claimant became an employee of the Respondent. The Claimant described their working relationship however as not being that of a 'normal master and servant relationship'. He saw his role to pass on his years of experience to the Respondent. However, he agrees that from 1 July 2018 he was employed by the Respondent.
5. What is at issue in this claim is the terms of the contract between the Claimant and the Respondent. There was other evidence given about the nature of their working relationship however this has not been considered as it is not relevant to the issues I have to determine.
6. There is no written contract between the parties. It is agreed by both parties that the Claimant was paid a salary of £1,800 pcm for about two days' work per week. It is the Claimant's claim that he is also entitled to a bonus payment from the Respondent. The Respondent's case is that no bonus was agreed as part of the Claimant's remuneration package.
7. The Claimant relies on an email dated 4 May 2018. In this email he uses the word 'proposal' "If appropriate paid a bonus to reflect additional time spent by me and fees brought in," "will obviously need to discuss matters further". There appears to have been a discussion in June 2018 however no agreement was reached.
8. The Claimant accepted in evidence, that a bonus was not specifically agreed. His case relies on his belief that he should be paid a bonus, as otherwise he would effectively be working for £30 per hour. However, what I am looking for is that the constituent elements of a contract to determine if a bonus was ever agreed.
9. I am satisfied that the question of a bonus was discussed but no basis on how a bonus would be paid, when it would be paid, or any conditions attached to payment were discussed at any time let alone agreed. For a contract to exist, several conditions must be satisfied. There must be an agreement (usually consisting of an offer which is then accepted) made between two or more people, the agreement must be made with the intention of creating legal relations and the agreement must be supported by consideration — i.e. something of benefit must pass from each of the parties to the other. The individual terms of a contract must be sufficiently certain for the courts to be able to give them meaning.
10. None of these elements apply in relation to any bonus. I therefore find that there was not a contractual term relating to bonus payments and the Claimant's claim is therefore dismissed.
11. The Respondent has brought a counterclaim and given that there is no written

contract relies on implied terms as the basis for the counterclaim. The implied terms relied on are:

- 11.1 Implied term as to confidentiality. The Respondent's case is that the Claimant withheld company information despite her asking the Respondent to return it. The Claimant denies he did not return company information.
 - 11.2 The implied term not to disrupt the employer's business
 - 11.3 The implied term not to withhold customer information
 - 11.4 The implied term not to compete with the employer's business
 - 11.5 The implied term not to solicit the Respondent's customers and
 - 11.6 The implied term not to misuse the employer's property.
12. The starting point in my consideration is that there was no written contract between the parties so no express restrictive covenants or terms relating to confidentiality. This is something that was open for the parties to agree and incorporate in an express contract. They chose not to do this.
 13. There is a difference between when someone is employed and what happens after the employment ended in relation to the duty of fidelity and confidentiality. These duties apply during employment but not when the employment relationship ends when it does not exist. It is for this reason that it is common to have restrictive covenants in employment contracts. In any event, there was no evidence, apart from the Respondent's bald assertion that the Claimant had breached this duty.
 14. Incorporating a company during employment, even if it was a competing company, would not breach the duty of fidelity. The Claimant's evidence is that he incorporated his company prior to leaving the Respondent's employment but did not start trading or working with that company until after he left. There was no evidence to the contrary. It is a feature of this case, that many of the clients in question had been long standing clients of the Claimant's for many years and may well have wanted to continue working with him when he left, in the same way that they continued working with him when he joined the Respondent. There was some agreement as to clients the Claimant could take when he left the Respondent's employment.
 15. In relation to confidential information, there is a difference between general client and confidential information and trade secrets. Trade secrets would be protected by an implied term after an employment relationship ended even if there was not express term to that effect. This does not apply to general confidential information. The duty of fidelity ends with the employment and in order to protect this type of information there needs to be an express restrictive covenant in the contract. This does not apply here and there is no suggestion of any trade secrets being in issue.

16. I do not find that any of the implied terms on which the Respondent relies apply. I do not find from the evidence before me that there were any breaches of fidelity when the Claimant was employed by the Respondent. There is no evidence of solicitation of clients for example prior to him leaving the Respondent.
17. It was clear from the conduct of this hearing that there was significant bad feeling between the parties. However, neither the claimant's claim or the Respondent's counterclaim succeeds. From the Claimant's perspective, there was no contractual term entitling him to a bonus. This may well have been something he thought was appropriate, however without the contractual term his claim must fail. From the Respondent's perspective the lack of any contact with any express terms relating to confidentiality, fidelity post-employment and so on means that the law is unable to offer any protection. For there to be protection the parties must agree express terms. This was not done.
18. In all the circumstances the Claimant's claim and the Respondent's counterclaim are dismissed.

Employment Judge Martin

Date: 15 January 2020