



EMPLOYMENT TRIBUNALS

Claimant: Mr I Botham

Respondent: The Vintage Motor Cycle Club Limited

Heard: via Cloud Video Platform **On:** 30 April 2021

Before: Employment Judge Ayre (sitting alone)

Appearances

For the claimant: In person

For the respondent: Ms H Strawbridge, solicitor

JUDGMENT

1. The claims for holiday pay and for arrears of pay are dismissed upon withdrawal.
2. The claim for a redundancy payment (which is in effect a claim for breach of contract) fails and is dismissed.

REASONS

The Issues

1. The issue that fell to be determined at today's hearing was the following :

Is the claimant entitled to a redundancy payment in the sum of £40,721.28
2. The claimant having already received a statutory redundancy payment, the claim proceeded as one for breach of contract.

The Proceedings

3. By claim form presented to the Tribunal on 28 November 2020 following a period of Early Conciliation from 21 September 2020 to 4 November 2020 the claimant brought a claim for a redundancy payment, for holiday pay and for arrears of pay. The respondent defends the claim.

4. In essence, the claimant's complaint is that he agreed with a director of the respondent that he would be paid a redundancy payment equivalent to one year's pay plus a statutory redundancy payment, "lieu hours" and holiday pay, but in fact he received a redundancy payment that was much lower.
5. At the start of today's hearing the claimant told me that he had been paid all of the holiday pay and "lieu hours" that he was entitled to, and was therefore no longer pursuing claims for holiday pay and arrears of pay. Those claims are therefore dismissed upon withdrawal.
6. I heard evidence today from the claimant and, on behalf of the respondent, from Brian Southam, director. A witness statement had been prepared for Mr Southam. The claimant had sent in a witness statement for a Mr Patrick Rowbotham, the former Chairman of the Board of Directors of the respondent. The statement was not signed and Mr Rowbotham was not present to give evidence and be cross examined. I have placed no weight whatsoever on his statement in reaching my decision.
7. The claimant had not prepared a witness statement. After some discussion, during which Ms Strawbridge helpfully indicated that she was not seeking a postponement of today's hearing, it was agreed that page 13 of the Claim Form would be treated as the claimant's witness statement. The claimant was also given the opportunity to make additional comments.
8. There was an agreed bundle of documents running to 84 pages. The claimant wished to introduce also the respondent's Articles of Association, which he said showed that, whilst there was a limit of £25,000 on capital expenditure by the respondent, there was no limit on employment expenditure.
9. Neither party had a copy of the Articles of Association. I indicated that I would read them if one of the parties sent them in. In the circumstances however, I do not consider it necessary for me to consider them in order to make my decision.

Findings of fact

10. The respondent is a membership club with just over 13,000 members. The claimant was employed by the respondent, latterly as its General Manager, until 30 August 2020 when his employment terminated by reason of redundancy.
11. The claimant began working for the respondent on 18 March 2011. He initially worked for the respondent as a self-employed consultant under a contract for services.
12. On 1 October 2015 the claimant signed a contract of employment and became an employee of the respondent. The contract of employment states that the claimant's employment started on 1 October 2015. When giving evidence today the claimant accepted that he had been self-employed up until the 1 October 2015. I therefore find that the claimant's employment with the respondent started on 1 October 2015.

- 13.** At the time of his dismissal in August 2020 the claimant was aged 54 and had four complete years' service. His annual salary was £40,721 gross, which gives a gross weekly pay of approximately £783. His statutory redundancy payment entitlement was £3,228
- 14.** In early 2020 the respondent carried out a review of its staffing structure. The respondent had experienced a reduction in income and was forecasting a shortfall for 2020 which could be more than £100,000. There were also concerns that, without a new financial model, the respondent would face an even bigger shortfall in 2021, of £140,000.
- 15.** A detailed paper summarising the issues and the proposals for resolving the situation by restructuring the business, was prepared in early May 2020. The paper set out a proposed new staffing restructure, with an overall reduction in the number of employees from 8.75 FTE to 5, with 2 staff moving on to zero hours contracts.
- 16.** The role of General Manager no longer existed in the new structure. Instead, there was a new role of Operations Manager on a salary of £30,000 - £35,000. That role was discussed with the claimant, but he was not interested in it because of the drop in salary.
- 17.** The paper estimated that the redundancy costs associated with the restructure would be between £10,000 and £25,000.
- 18.** On 5 June 2020 the claimant was placed at risk of redundancy.
- 19.** On 16 June 2020 the respondent held a redundancy consultation meeting with the claimant. Bob Clark, who was at the time Chairman of the Board of Directors, and Cliff Harris, another Director, were present at the meeting along with the claimant and a Ms Ruth Seddon, HR Consultant.
- 20.** During the consultation meeting the reasons for the proposed redundancy were explained. The claimant was asked if he had any questions and replied 'it's fine'. The claimant was also asked if he wanted to have a protected conversation and replied 'No, not at this stage'.
- 21.** Mr Harris told the claimant that notice and redundancy payments would be in line with the statutory requirements.
- 22.** A second consultation meeting took place on 19 June 2020. The same people were in attendance. In between the two meetings the claimant had been sent the job description for the new Operations Manager role. He was asked if he wanted to 'go for it' and said that he did not want to.
- 23.** He was again asked if he wanted to have a protected conversation and said 'I don't see the point'. Later on in the meeting the claimant said that he'd not had chance to speak to his trade union representative, and it was agreed that the claimant would be given time to take advice.
- 24.** After the meeting on 19 June the respondent sent an email to the claimant inviting him to a third and final consultation meeting on 26 June at 11 am, and

setting out the payments that would be made should the claimant be made redundant. These included a statutory redundancy payment of £3228 tax free.

- 25.** On the morning of 23rd June 2020 there was a telephone conversation between the claimant and Brian Southam. There was a significant conflict of evidence between the claimant and Mr Southam as to what was said during that meeting.
- 26.** The claimant said that Mr Southam made an offer of a settlement package equivalent to a year's pay plus statutory redundancy, holiday pay and overtime. He produced handwritten notes of the conversation which are undated and which were not shared with Mr Southam prior to the Tribunal hearing. They could have been written at any time.
- 27.** Mr Southam could not recall the conversation on 23 June. He accepted that he may have spoken to the claimant that day, as he did speak to him about club business, but could not recall what they had discussed. He was adamant that no offer of settlement had been made. He did not have the authority to make an offer to the claimant, and I believe that the claimant knew that. The claimant had worked for the respondent in senior positions for many years, and had previously been a member of the Board of Directors. He knew, in my view, that any offer made by Mr Southam would have to be ratified by the Board.
- 28.** Mr Southam accepted that he had previously discussed the possibility of the claimant leaving the respondent's employment with a redundancy package, but this conversation took place face to face in December 2019.
- 29.** There are a number of comments and questions that have been written down in the notes, but it is not clear who said what. There is, for example a comment "Don't wish to see you leave with nothing", which I have concluded was made by Mr Southam. There is then a question "offer settlement package similar to James / Giles?" which could have been asked by either the claimant or Mr Southam. James and Giles were both previous employees of the respondent who had left, sometime previously, with enhanced redundancy packages.
- 30.** On balance, I prefer Mr Southam's evidence in relation to the conversation that took place on 23 June.
- 31.** There is, in my view, nothing in the claimant's notes which indicates that a firm offer of a year's pay plus statutory redundancy pay, holiday pay and overtime was made on 23rd June, nor that the offer was accepted. At best there is a discussion about a possible settlement package.
- 32.** There is also nothing in these notes which suggests that Mr Southam told the claimant not to discuss the 'offer' with Bob Clark or Cliff Harris, who were conducting the formal redundancy consultation.
- 33.** The claimant said in his evidence that it was good practice to make notes of important conversations and to confirm the contents of them in writing. That may very well be the case. There was no evidence before me, however, of the claimant making notes of any other conversations or meetings, nor of him confirming the contents of other conversations in writing. Not only that, but the follow up email that the claimant sent to Mr Southam on 26 June

purportedly confirming what had been agreed, was only sent three days after the conversation took place.

- 34.** A third and final redundancy consultation meeting took place on 26 June. There were no notes of that meeting before me today. The claimant accepted that the meeting had taken place at 11 am and told me that there had been a protected conversation during the meeting. He said that he was offered the option of the Operations Manager role, on a lower salary, or staying until the end of the year and then leaving with a redundancy payment. The claimant did not accept either of those offers.
- 35.** The claimant was clear in his evidence that he did not want to stay in the employment of the respondent, because of what he described as the 'in-fighting' and factions within the Board of Directors.
- 36.** The claimant accepted that, during this final consultation meeting, he had not mentioned the 'offer' that he alleges Mr Southam made to him, and that there was no discussion of the year's salary package that he also suggested during his evidence he had already accepted.
- 37.** At the end of the meeting the claimant was placed on garden leave and told to have no contact with colleagues. He remained on garden leave until his employment terminated on 31 August.
- 38.** The claimant was adamant, during his evidence today, that he had been told not to have contact with anyone at the respondent whilst he was on garden leave.
- 39.** Despite that, just a few hours later he sent an email to Mr Southam and another director, Mr Roy Moore. This email, sent at 15.02 on 26 June, after the claimant had been informed that he was being made redundant, was in my view self-serving. The claimant accepted that the only reason he had copied Mr Moore in was so that someone else had a record of the email, which suggests that he was looking to create an evidence trail to support his wish to receive a higher redundancy payment.
- 40.** Mr Southam, to his credit, accepted in evidence that he had received the email. I accept his evidence that he did not open the email, so did not know its contents.
- 41.** In the email of 26 June the claimant wrote "*I confirm that I accepted your offer of settlement Tuesday morning...*" The claimant appears to be suggesting here that on the morning of 23rd June he had accepted the 'offer' that he says had been made.
- 42.** During his evidence to the Tribunal however he referred to having three offers 'on the table' when he came out of the meeting on 26 June, two that had been made by Bob Clark and Cliff Harris on the 26th (an alternative role with the respondent, and working to the end of the year) and one that he says was made by Mr Southam on 23 June. In cross examination he stated that "*At the*

end of the meeting I turned down Bob and Cliff's offers and emailed Brian Southam to accept his'. This suggests that he only accepted the 'offer' on 26 June, and contradicts the wording in the email itself that the offer had already been accepted.

- 43.** This contradiction in the claimant's evidence is just one of the reasons that I find the claimant not to be a credible witness, and prefer the evidence of the respondent. The claimant also, during his evidence, said a number of things that I found not to be plausible. For example:-
- a. He said that the reason he had not chased Mr Southam for the settlement package was because he had been told not to have any contact with colleagues during garden leave. This is inconsistent with his evidence that, on the same day that he was put on garden leave, he wrote to Mr Southam and Mr Moore;
 - b. The claimant gave evidence that Mr Moore had telephoned him to confirm receipt of the email dated 26 June, yet he had no notes of that conversation, and Mr Moore did not give evidence. When I asked the claimant why Mr Moore was not giving evidence, the claimant said it was because Mr Moore didn't want to jeopardise his friendship with the claimant. I find that difficult to believe, given that Mr Moore's evidence, according to the claimant's account, would support his claim; and
 - c. The claimant's explanation for why he didn't raise the issue of the year's severance package with Mr Clark or Mr Harris until 10 September was not credible. He said this was because Mr Southam had asked him to keep it quiet and not mention it to either of them. Why would Mr Southam do this? At the very least it suggests that there was something 'underhand' in the 'offer' and should have alerted the claimant to the fact that it was not a bona fide offer.
- 44.** On 29 June 2020 the respondent wrote to the claimant giving him notice that his employment would terminate on 30 August 2020 due to redundancy. The letter also set out the payments that the claimant would receive in addition to his notice pay, namely a statutory redundancy payment of £3,228 and an ex gratia payment of £4,035. There is no mention in the letter of a settlement package of a year's salary. The letter did however inform the claimant of his right to appeal against the decision to make his position redundant.
- 45.** The claimant did not appeal against his dismissal. He did however send emails to the respondent asking for breakdowns of the payments that he would receive. Those emails made no mention of the one year package that the claimant said had been offered by Mr Southam.
- 46.** The respondent paid the claimant 9 weeks' notice, a statutory redundancy payment of £3,228 and an ex gratia payment of £4,035. The redundancy payment and ex gratia payment (which together came to £7,263) were paid, without deduction of tax and national insurance contributions, into the claimant's bank account in early September, and were set out in a payslip dated 31 August.

47. On 10 September the claimant sent an email to the respondent. In that email the claimant raised the issue of a year's severance package for the first time. A response to the email was sent in a letter dated 14th September in which the respondent wrote: "...You did not mention this alleged agreement at any point in the redundancy consultations or during your lengthy notice period, as you admit in your email. You also responded to the redundancy letter stating that you accepted its terms, again failing to mention this alleged agreement and you did not appeal the decision. You have also produced no evidence of the alleged agreement.

Any payment of the kind you have described in your email would have to be approved by the Board and as you surely know, one director would simply not have the authority to promise a payment to an employee..."

The Law

48. The right to a statutory redundancy payment is set out in section 135 of the Employment Rights Act 1996 ("**the ERA**"), which provides that :-

"(1) An employer shall pay a redundancy payment to any employee of his if the employee –

(a) Is dismissed by the employer by reason of redundancy..."

49. Section 162 of the ERA sets out the rules governing the calculation of a statutory redundancy payment and the relevant extracts are as follows:-

"(1) The amount of a redundancy payment shall be calculated by –

(a) Determining the period, ending with the relevant date, during which the employee has been continuously employed,

(b) Reckoning backwards from the end of that period the number of years of employment falling within that period, and

(c) Allowing the appropriate amount for each of those years of employment.

(2) In subsection (1)(c) "the appropriate amount" means –

(a) One and a half weeks' pay for a year of employment in which the employee was not below the age of forty one..."

50. The right to bring a complaint of breach of contract before the Employment Tribunal is set out in the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("**the Order**").

51. Article 3 of the Order states that:-

"Proceedings may be brought before an employment tribunal in respect of a claim of an employer for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if –

...(c) the claim arises or is outstanding on the termination of the employee's employment."

Conclusions

- 52.** I am satisfied, on the evidence before me, that the claimant has received a statutory redundancy payment calculated in line with the provisions of section 162 of the ERA. He is therefore not entitled to any additional money by way of statutory redundancy payment.
- 53.** I have also considered whether the claimant was contractually entitled to receive an additional redundancy payment of £40721.28.
- 54.** The burden of proving that he is contractually entitled to an additional redundancy payment lies with the claimant. He has not discharged the burden.
- 55.** I find, on the balance of probabilities, that there was no agreement between the claimant and the respondent that the claimant would be paid an additional year's pay. I make these findings for the following reasons:-
- a. Mr Southam did not, in my view, make an offer to pay the claimant a year's salary by way of settlement package. He did not have the authority to make such an offer, and the claimant knew that. There was a discussion between Mr Southam and the claimant that day, but no offer was made.
 - b. The email that the claimant sent on 26 June to Mr Southam and Mr Moore after he had been told he was being made redundant was entirely self-serving.
 - c. The claimant wanted to be paid a redundancy payment of one year's salary, and tried to create an evidence trail to support such a claim.
 - d. It was only after he had received the statutory and enhanced redundancy payments from the respondent that he raised the question of the year's pay with those who had conducted the redundancy consultation.
- 56.** There was in my view no binding contract between the claimant and the respondent that the respondent would pay the claimant an additional redundancy payment of a year's gross pay.,
- 57.** For the above reasons the claim fails and is dismissed.

Employment Judge Ayre

2 May 2021

Sent to the parties on:

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For the Tribunal:

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