



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr B Mills

**Respondent:** Dark Blue International Ltd

**Heard at:** Southampton **On:** 26 April 2019

**Before:** Employment Judge Dawson

## **Representation**

**Claimant:** In Person

**Respondent:** Mr Clarke, Consultant

**JUDGMENT** having been sent to the parties on 7 May 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. This is a claim only for breach of contract in respect of the non-payment of notice pay.

### Conduct of the Hearing

2. At the outset of the hearing Mr Clarke made an application to adjourn the hearing as Ms Kultur was not here on behalf of the respondent. He told me that the respondent wished to defend the claim. He told me that Ms Kultur was out of the country on business but wished to give evidence.
3. Ms Kultur had not served a witness statement in accordance with the directions of the tribunal.
4. Mr Clarke told me that Ms Kultur had decided that attending to the business matter was a priority for the Respondent over attending the tribunal hearing
5. I refused the application to adjourn for the following reasons.

6. The claim is of low value, being not worth more than £2,000, the matter had been listed for a long time and well before the respondent's business trip was planned, the respondent had not served a witness statement on behalf of Ms Kultur or anyone else. I took into account the fact that the claimant had also not served a witness statements, but he was at the tribunal and the difficulties caused by that failure could be fairly dealt with. Adjourning the hearing would prejudice the claimant and cause a delay to his case being resolved and would also cause delay to other litigants. There was no satisfactory reason, as far as I could tell, for the respondent to prioritise its business need over the tribunal hearing. In those circumstances, it seemed to me there was no good basis for adjourning the hearing.
7. The claimant had not served a witness statement because, he said, he thought the claim was going to settle. I proposed hearing the case but limiting the claimant's evidence to the matters he had set out in the claim form and the answers he gave in answer to cross examination. Mr Clarke did not seek to dissuade me from that course of action.
8. The bundle of documents was only provided to the claimant on the day of the hearing, which was also a breach of the Employment Tribunal's directions. I was told that was because the consultant, Mr Clarke, had only been lately instructed. It was agreed by the claimant that I could see the documents that the respondent wished to refer to but I bore in mind that he had only seen the bundle for the first time today.

#### Issues

9. The central issue is whether the claimant is entitled to payment of his notice pay. The respondent asserts that he is not because he was in breach of contract by carrying on additional business, other than as an employee of the respondent and therefore the respondent was entitled to dismiss him without notice.
10. There are, therefore, two issues. Firstly, whether the claimant did offer his services to others and secondly, if he did, whether doing so amounted to a repudiatory breach of contract.
11. The only evidence to which I was taken by the respondent in terms of the factual allegation that the Claimant carried on additional business was at page 47 of the bundle a conversation between the claimant and another.

#### Findings of Fact

12. I made the following findings of fact.
13. It is not in dispute that under Clause 7.4 of the claimant's contract of employment during his probationary period he was entitled to one month's notice.
14. On 27 July 2018, whilst in the probationary period, the claimant was dismissed summarily. In the meeting at which he was dismissed he was not told that the reason was because he had been offering his services

outside of his employment, simply that as he was still on probation the Company did not have to pay notice pay.

15. At his interview with the respondent before taking up his position, the claimant had raised with representatives of the respondent that he still worked for other clients. He did so to make sure that the respondent knew that and that there would be no conflicts of interest.
16. The claimant told me and I accepted that the respondent's attitude was that, because there was no conflict of interest, the respondent was relaxed about him carrying on his own work and it asked him to use the same methodology with their clients as he used with his own.
17. I find that thereafter, the claimant carried on working on a self employed basis with other clients, he did so with the knowledge of the respondent and the work that is evidenced at page 47 of the bundle was in accordance with that agreement.
18. However, the contract of employment at Clause 20.1 provides that the claimant must devote his whole time and attention and abilities during hours of work to the company. He must not undertake any other duties of whatever kind during his hours of work for the company.
19. Clause 20.2 provides that the claimant must not engage, whether directly or indirectly, in any business or employment which is similar or in any way connected to a competitive business of the company.
20. In fact, I was not provided with any evidence that the work which is referred to at p47 was being done within the claimant's work hours with the company or was work which fell within the definition in Clause 20.2.
21. However, Clause 20.3 does state that whilst the claimant is employed with the company he may not engage whether directly or indirectly in any additional business or employment without prior written consent of a company Director.

### The Law

22. I have referred myself to the case of Autoclenz v Belcher [2011] IRLR 820 where at paragraph 53 Lord Clarke stated that the true position is that where there is a dispute as to the genuineness of a written term in a contract, as there is here in relation to Clause 20, the focus of the enquiry must be to discover the actual legal obligations of the parties. To carry out that exercise, the tribunal have to examine all the relevant evidence. That will of course include the written term itself read in the context of the whole agreement. It will also include evidence of how the parties conducted themselves in practice and what their expectations of each other were.

### Conclusions

23. I find that the true agreement between the parties in this case was not set out in Clause 20 of the contract but in the oral agreement formed at the

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interview stage. It was that the claimant was entitled to carry out additional work on his own behalf even while working for the respondent, which included the work evidenced at page 47 of the bundle.

24. In those circumstances I find the claimant was entitled to send the email which the respondent objects to and do work for that client. In doing so he was not in breach of contract.
25. Given that the Claimant was not in breach of contract, he was entitled to his notice pay.
26. In those circumstances the claim succeeds in the amount claimed.

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Employment Judge Dawson

15<sup>th</sup> May 2019