



EMPLOYMENT TRIBUNALS

Claimant: Marchwood Engineering Ltd

Respondent: Mr M Boncimino.

Heard at: Southampton

On: 30 November 2020

Before: Employment Judge Hargrove

Representation

Claimant: No attendance

Respondents: Ms J Price of Counsel.

JUDGMENT AND REASONS

The Judgment of the Tribunal is as follows:

1. The claimant's application for a postponement is refused.
2. The claimant's employer's claim is not well-founded.

REASONS

1. In these reasons I will refer to the claimant as Marchwood and the respondent as Mr B. Proceedings were originally commenced on the 16th of July 2019 by Mr B arising out of his employment with Marchwood as an appliance engineer. He had been employed from the 24th of August 2018 until his resignation on the 12th of June 2019. He had been suspended without pay from the 21st of May 2019. In his ET1 he claimed notice pay, unpaid wages and holiday pay. In its response Marchwood asserted that Mr B had been running his own business from his home in competition with Marchwood; that he had been using the company's estate car for his business as well as Marchwood's; and claimed by way of an employers counterclaim £33,812, including £29,376 for loss of income, £386 for missing parts, +£4050 for use of the company car. Mr B subsequently withdrew his claims. However he submitted a defence to the employer's claim. While he admitted that he had had his own repair business since before he worked for Marchwood, providing services mainly to the Italian

community in his local area in Woking, he had disclosed it to Marchwood at the start of his employment. He put Marchmont to proof of the losses claimed.

2. The sole director of Marchwood is Mr Richard Feeney. The business is based in Ringwood, Hampshire and provide services throughout the south of England. At a case management hearing on 3rd of April 2020, after the onset of Covid, Marchwood was represented by Mr Feeney. The issues were identified and case management orders were made, including for the provision of a fully itemised schedule of loss by Marchwood, further identification of the grounds of claim and the exchange of documents so that the respondent could prepare a joint bundle. Of these, MarchWood has only provided three witness statements, from Mr Feeney, Amber Powell and Darren Berkshire. Mr Feeney's witness statement attaches a schedule of his calculations, claiming £23,948, presumably having discovered that the Employment Tribunal limit was £25,000, but not consistent with the amounts claimed in the claim form. The date for this hearing was notified to the parties in writing in early November 2020 more than 14 days before it was due to start. On 13th of November it was notified that it would be by CVP plus and detailed guidance was given as to how to participate.
3. At the outset of the hearing Mr B attended with counsel and solicitor. I was provided with Mr B's bundle of documents and the witness statements. No documents have been disclosed by Marchwood. It was indicated on the chatline that Mr Feeney had attempted to join the hearing but apparently without success. His other witnesses did not attend. I made at least four attempts to contact Marchwood on the landline number given on the response/counterclaim, and as the business telephone number on its website, but was notified on each occasion that the number was unobtainable. I then contacted the CVP administration number and was informed that Mr Feeney was applying for a postponement, although no such application was made to the Tribunal . I directed that Mr Feeney be contacted by email to notify him of my mobile phone number and to contact it. I checked with the tribunal office that no contact had been made by email or telephone. At the time of writing this judgement at 5 pm on 1st December still no contact has been made by Marchwood. I was intending to ascertain whether alternative means of communication, by WhatsApp, or Teams or telephone could be established . There was no communication from Mr Feeney up to 11:50 am when the hearing ended. I considered the contents of the witness statements, the bundle of documents including Mr B's contract of employment, and Counsel's written submissions.
4. I was satisfied of the following matters: –
5. The claim by Marchmont had little prospect of success. It was not stated what terms, express or implied, the claimant was alleged to have been breached. I am satisfied that the claimant had informed Mr Feeney that he had his own local business, which he undertook in the evenings and weekends when not working for Marchwood. I noted that his contract of employment specified no regular working hours but required him to do a fixed number of calls each working day, six, later reduced by agreement with Mr Feeney. I was not satisfied that Marchwood had incurred losses of profit, as opposed to gross income which was claimed by the respondent Marchwood, for which Mr B was responsible, which was by far the major

part of their claim. There was no documentary evidence to support that claim at all, nor the claim for damage to a customer's premises. I was satisfied that Mr B had used the car for his own business as well as private use, but he was allowed private mileage and I was satisfied that he had claimed mileage costs (at 10p per mile) and used the float only for miles driven when servicing Marchwoods customers. I was not satisfied, if it be Marchwood s case, that the claimant had poached customers or retained payments from them. I was not satisfied that Mr B had breached any implied term of fidelity. For these reasons , I reject Marchwood's claim .

6. I was also satisfied that in the circumstances, including Marchwoods failure to comply with tribunal orders, and its failure to make reasonable attempts to contact the tribunal or to attend the hearing by other means, that the claim was not actively pursued, and had been conducted unreasonably. I would in any case have struck it out under Rule 37.

Employment Judge Hargrove

Date 1 December 2020.