

AMERICAN ARBITRATION ASSOCIATION

EMPLOYMENT ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

Re: Case Number: 01-15-0004-1074

Keith Gilbert
-vs-
Baker Hughes Incorporated

Interim Award

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the employment agreement entered into between the above-named parties, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, do hereby render this INTERIM AWARD, as follows:

Authority

I have authority to hear and decide this matter pursuant to the Employee Agreement between Baker Hughes and Mr. Gilbert. Section 17 of the Employee Agreement requires arbitration of all disputes between Mr. Gilbert and Baker Hughes pursuant to the rules of the American Arbitration Association.

Under the Association's rules, I am required to render a reasoned award. There is no requirement for detailed findings of fact or conclusions of law under the Federal Arbitration Act, the Association's arbitration rules, or the arbitration clause of the Employee Agreement. Thus, this opinion merely summarizes some of the principle grounds for the decision, without any attempt to provide supporting detail. No party made any request for findings of fact and conclusions of law, and neither the applicable law nor customary arbitration practice requires detailed analysis.

Given the exceptionally limited grounds for judicial review, I write solely for the parties. There is thus no reason to recite the facts in detail.

Procedural History

At the start of the hearing, the parties stipulated in writing that Mr. Gilbert seeks monetary damages in the amount of \$65,063.17, plus attorneys' fees, and does not seek as damages the value of the Halliburton stock and/or stock options that he claims to have forfeited upon his departure from Halliburton.

Pursuant to the written stipulation, the parties also agreed to bifurcate the hearing, so that attorneys' fees would be addressed only after the issuance of a ruling on the merits. Thus, the parties agreed that the 30 day deadline for issuance of the award would apply to this opinion on the merits, leaving resolution of attorneys' fees until after this.

Issues

The issues raised are narrow. Mr. Gilbert seeks recovery of approximately \$65,000 based on claimed assurances at the time of hire that severance would be calculated based on his entire history of employment with Baker Hughes, not just the most recent period of employment.

Mr. Gilbert's pleadings raise two claims:

1. Breach of contract, alleging that the oral conversations with Mr. Freeman modified the written job offer letter, binding the company to calculate severance based on his entire history of employment, if he were ever offered severance.
2. Fraudulent inducement, claiming that he was misled about the terms of future severance by assurances from Mr. Freeman.

Baker Hughes asserts ERISA preemption, taking the position that the severance plan is an ERISA plan, that Mr. Gilbert's sole remedy under ERISA would be recovery of whatever benefits are provided for under the terms of the plan, and that Mr. Gilbert failed to exhaust plan remedies. In addition, Baker Hughes asserts that Mr. Gilbert never received any promise or assurance of severance benefit based on his entire history of employment with the company. Even had there been such a representation, the discussions lacked the specificity to form a contract.

For the reasons briefly outlined below, I find in favor of Mr. Gilbert on the claim of fraudulent inducement and against Mr. Gilbert on the breach of contract claim.

Background

Mr. Gilbert initially worked for Baker Hughes for several months over 21, before leaving to take a job with Halliburton. About two years later, Mr. Gilbert returned to Baker Hughes. Mr. Gilbert negotiated with Mark Freeman over his return to Baker Hughes.

Mr. Gilbert contends that Freeman expressly represented that if Gilbert were ever laid off, severance pay would be based on his entire history of employment with Baker Hughes, including the initial 22 years.

The critical issue is what happened in the negotiations. The evidence on this critical topic is exceptionally limited. Mr. Gilbert's testimony was sparse, and Mr. Freeman recalled essentially *none* of the details of their conversations.

Mr. Gilbert testified that he and Mr. Freeman "talked about my time picking up where it left off, and we specifically discussed severance because severance was the only thing that I cared about

with regard to time picking up where it left off." Transcript p.25.¹ Mr. Gilbert testified that Freeman responded that "with regard to the severance pay and the time picking up where it left off, he immediately stated that there was no issue with that. That's not a problem." Transcript p.26. This is the whole of the testimony on the one issue which really matters. Transcript p.36-37.

Mr. Gilbert only had one brief conversation with Mr. Freeman about the issue of full credit for prior service, during which Mr. Freeman affirmatively stated there would be no problem with Mr. Gilbert getting full credit for prior years of service, including in connection with severance. Transcript p.36. The subject was not raised again after the one brief discussion. Transcript p.37, lines 8-10. It is not the number or duration of the discussion which is important, but the content. Here, the only actual evidence of the content of that discussion comes from Mr. Gilbert. Mr. Freeman simply has no recollection.

While limited, this testimony contains the key elements at issue – that a Baker Hughes manager made a specific representation that Mr. Gilbert would be credited with all of his years of service, for all purposes, including severance pay.

Mr. Freeman on the other hand remembered almost nothing about the discussions with Mr. Gilbert, other than that they did discuss the issue of credit for prior years of service. Indeed, Mr. Freeman's testimony was remarkable for his near total lack of recollection of anything.

Mr. Freeman could not remember how the discussion of credit for prior years of service came up. Transcript p.137. It was not until he reviewed emails that Mr. Freeman even remembered checking into the policy. Transcript p.137. Mr. Freeman could not recall the timing of their discussions over Mr. Gilbert's return to Baker Hughes. Transcript p.138. Mr. Freeman could not remember how many conversations that he had with Mr. Gilbert on the issue of credit for prior years of service. Transcript p.139. Mr. Freeman could not recall whether he discussed other issues with Gilbert at the same time, leaving him to speculate based on the content of emails. Transcript p.139. Mr. Freeman could not recall exactly how or in what context the discussion of credit for prior years of service arose. Transcript p.143. Mr. Freeman cannot recall one way or another whether Mr. Gilbert asked about severance during their discussions. Mr. Freeman cannot remember one way or the other whether Mr. Gilbert asked about specific benefits. Transcript p.143. In fact, Mr. Freeman remembers nothing about their conversation, except for what is reflected in the email between himself and Margaret Erpenbeck. Transcript p.143. Mr. Freeman cannot remember whether or not he received any response from Ms. Erpenbeck to his email. Transcript 144. Mr. Freeman merely guesses that he probably searched the online HR portal for information about the company's policy on credit for prior years of service. Transcript p.144.

¹ All references to the transcript of the final hearing are of the form Transcript p.XX. The two volumes of the transcript are not separately page numbered.

About the only thing which Freeman professes to remember is that he did review the company's North America – Credit for Prior Service policy. Transcript pp.146-147. Joint Exh. 9. Mr. Freeman does not remember whether or not he had any conversation with Ms. Erpenbeck about that policy. Transcript p.149. Freeman never reached out to Ms. Erpenbeck for confirmation of his understanding of the North America – Credit for Prior Service policy. Transcript p.149.

Mr. Freeman has no recollection of whether he ever sent a copy of the North America – Credit for Prior Service policy to Mr. Gilbert. Transcript 149. Mr. Freeman does not remember whether he ever sent any information about benefits to Mr. Gilbert in the course of their negotiations. Transcript p.151.

While Mr. Freeman is "certain" that he followed up with Mr. Gilbert, that is only because Mr. Gilbert had asked, and his practice would have been to respond. Mr. Freeman has no actual memory of discussing the Credit for Prior Service policy with Mr. Gilbert or of giving a copy of that policy to Mr. Gilbert.

Neither side offered any emails or other correspondence between Mr. Gilbert and Mr. Freeman concerning the question of severance pay or credit for prior years of service. Ms. Erpenbeck did not talk to Mr. Gilbert about severance pay or prior years of service. Much like Mr. Freeman, Ms. Erpenbeck could not recall one way or the other whether she ever responded to Mr. Freeman's email about credit for prior years of service. Transcript 84. While she speculates she might have called him the phone, Ms. Erpenbeck has no memory of whether she actually did so and has no recollection of the contents of any such conversation, if it happened. Transcript pp.85, 97.

The only other witnesses added nothing. Neither Mr. Littleton nor Mr. Shealy were involved in the conversations between Gilbert and Freeman, and so were not able to shed light on what Freeman and Gilbert discussed.

Given Mr. Freeman's near total lack of memory, Mr. Gilbert's limited testimony is thus the only actual evidence of the discussions between them. Despite its limited nature, I find Mr. Gilbert's testimony credible. Mr. Freeman's lack of recollection leaves Baker Hughes with no counter to Mr. Gilbert's limited, but credible, evidence.² Thus, based on the limited evidence available, I find that Mr. Gilbert has carried his burden of proof to show that Mr. Gilbert represented that if he returned to Baker Hughes, that severance pay would be calculated based on his entire history of employment, not just the most recent period of employment.

² To be clear, Mr. Freeman was unable to remember one way or the other. Had Mr. Freeman's memory extended to remembering that the conversations did not actually take place or an actual recollection that he had not made any promise about calculation of severance, this would be an *entirely different* analysis.

Mr. Gilbert's pleadings argue that the brief conversation with Mr. Freeman modified Mr. Gilbert's contract of employment, apparently referring to the job offer letter which came later. Joint Exh. 1. Given that the job offer letter does not refer to severance pay at all, a brief conversation on credit for prior years of service cannot modify a job offer letter which does not mention severance pay. The job offer letter does not detail the benefits being offered, stating only that "You will be eligible to participate in Company sponsored benefit programs." Joint Exh. 1. I find against Mr. Gilbert on his breach of contact claim.

In its post-hearing brief, Baker Hughes argues that Mr. Gilbert was not actually laid off - he quit – and was thus not eligible for severance pay at all. Transcript p.55, lines 6-23. However, Baker Hughes clearly considered Mr. Gilbert to have been laid off, *as it actually offered him severance pay* (calculated only on the most recent period of employment), which Mr. Gilbert declined to accept. Joint Exh. 8. I reject Baker Hughes' contention that there was no occasion to consider severance pay at all.

The more compelling claim is the one for fraudulent inducement. Here, the only relevant and credible evidence comes from Mr. Gilbert. He testified that Mr. Freeman assured him that if he returned to Baker Hughes, any severance pay offered on layoff would be based on his entire history of employment, not just the most recent stint. Mr. Gilbert testified credibly as to his reliance on this assurance, and its impact on his decision to return to Baker Hughes. I find that Mr. Gilbert has satisfied the elements of a claim for fraudulent inducement.

The evidence, though thin, is unrebutted that Mr. Freeman misrepresented that Mr. Gilbert would receive full credit for prior employment for all purposes, including severance. Such misrepresentation was either made knowingly by Mr. Freeman, or made recklessly without knowledge but as a positive assertion. Mr. Freeman was aware that Mr. Gilbert was extremely concerned about the issue of credit for prior years of service, and Mr. Gilbert testified credibly as to the importance of this issue. The evidence supports that Mr. Gilbert relied on the assurance he received from Mr. Freeman. The representation was false, resulting in harm to Mr. Gilbert.

For the reasons outlined in Judge Ellison's Memorandum and Order I find that Mr. Gilbert's fraudulent inducement claim is not ERISA preempted. Joint Exh. 25, Section IV.B. I have considered Respondent's arguments as to why the claim should be pre-empted. Yet despite Baker Hughes' efforts to distinguish the evidence at the final hearing, I am persuaded that Judge Ellison's analysis remains valid, and I adopt his ruling.

Damages

Before the start of the hearing, counsel for both sides entered into a written stipulation dated April 29, 2016 that Mr. Gilbert was seeking damages in the amount of \$65,063.17, plus attorneys' fees. The stipulation is to the amount that Mr. Gilbert is seeking, not a stipulation that \$65,063.17 is the proper measure of damages.

Mr. Gilbert offered no specific evidence or argument as to the calculation of his damages. Nor did Baker Hughes specifically address damages through either evidence or argument. Although the available evidence is minimal, the stipulated amount is supported by the evidence.³ I thus award Mr. Gilbert the sum of \$65,063.17.

Ms. Erpenbeck testified that Baker Hughes routinely awarded severance pay when conducting layoffs, and that she believed Baker Hughes always did so. Transcript p.91.

Mr. Gilbert's post hearing brief requests an award of exemplary damages to be determined in a separate hearing. The parties' stipulation to bifurcate covered only attorneys' fees. There was no argument or evidence during the hearing with respect to exemplary or punitive damages. There was no agreement or discussion during the hearing as to handling of punitive or exemplary damages. I would, in any event, decline to award exemplary or punitive damages on the facts before me.

I have considered, and rejected, the other affirmative defense raised by Baker Hughes. To the extent Mr. Gilbert asserted other claims or causes of action; I have considered and rejected those as well.

I award Mr. Gilbert the sum of \$65,063.17.

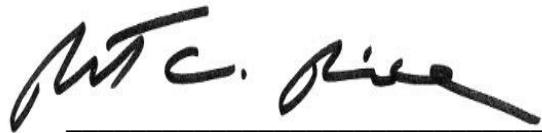
ORDERS

1. I find against Mr. Gilbert on the claim of breach of contract.
2. I find in Mr. Gilbert's favor on the claim of fraudulent inducement.
3. I award Mr. Gilbert the sum of \$65,063.17.
4. I find against Mr. Gilbert on his request for punitive damages.
5. The parties shall, within 21 days for the date of this order, submit any request for attorneys' fees. Responses opposing a request for attorneys' fees shall be submitted within 14 days after filing of the application for attorneys' fees. Counsel are expected to make a good faith effort to resolve attorneys' fee issues by agreement, as far as possible.

³ Mr. Gilbert's first period of employment with Baker Hughes was a few months more than 21 years, and the second a bit more than a year and a half, for a total period of employment of approximately 24 years. Transcript pp. 25, 30, 53 & 60. Joint Exh. 1, 8. The job offer letter establishes the bi-weekly salary of \$5,576.92, which equates to \$2,788.46 per week. Multiply 24 times \$2,788.46 equals a total of \$66,923.04. Mr. Gilbert stipulated that the amount sought was \$65,063.17, and thus I award that amount.

This Interim Award shall remain in full force and effect until such time as a Final Award is rendered.

Signed: June 29, 2016



Robert C. Rice
Arbitrator