THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Cartwright	**v**	QA Limited

Heard at: London Central **On**: 13 October 2017

Before: Employment Judge Baty

Representation:

Claimant: In Person
Respondent: Mr G Baker (Counsel)

JUDGMENT

The Claimant's complaint of breach of contract in respect of notice pay fails.

REASONS

The Complaint

1. By a claim form presented to the Employment Tribunal on 24 July 2017, the Claimant brought a complaint of breach of contract in respect of notice pay. The Respondent defended the complaint.

The Issue

2. At the start of today's hearing, it was agreed that the dispute centred on whether the Claimant was entitled to 3 months' notice of termination of employment or one month's notice of termination of employment and that he had been paid in lieu of one month's notice of termination of employment. The parties agreed that, were the claim successful, the amount owed to the Claimant would be £7,500 gross (being two months' salary).

3. It was agreed that the issue before me was whether or not the Claimant was entitled under his contract to one or three months' notice of termination of employment.

The Evidence

4. Witness evidence was heard from the following:-

   For the Claimant:-

   The Claimant himself.

   For the Respondent:-

   Mr Ryan Amos, who was a Digital Operations Manager at the Respondent and the Claimant's Manager during his employment with the Respondent.

5. In addition, an agreed bundle of documents numbered pages 1 - 108 was provided to the hearing. By consent a further document, containing a text message, was added to the bundle.

6. In addition, Mr Baker provided a skeleton argument for the Respondent, to which were attached several authorities.

7. I read in advance the witness statements and any documents in the bundle to which they referred, together with the Respondent's skeleton argument.

8. There was a limited amount of cross examination of the witnesses. Thereafter, both Mr Baker and the Claimant made oral submissions.

9. I adjourned briefly to consider my decision. When I returned, I gave my decision with reasons for it orally to the parties. Mr Baker then asked if written reasons could be produced.

Findings of Fact

10. I make the following findings of fact. In doing so, I do not repeat all of the evidence, even where it is disputed, but confine my findings to those necessary to determine the agreed issue.

11. The Respondent is a national training company based in the United Kingdom, which provides training in IT, project management and business skills. The Claimant commenced employment with the Respondent on 24 October 2016 as an Instructional Designer.

12. The Respondent terminated the Claimant's contact on 18 May 2017 on the grounds of poor performance. The Claimant was paid one month's salary in lieu of notice.

13. The Claimant was dismissed more than 6 months after his employment commenced. At no point was he informed in writing that his probationary period had been successful.

14. Clause 1.3 of the Claimant's contract of employment provides that:-

> "The first six months of your employment shall be a probationary period during which your performance and suitability for continued employment will be monitored. We may, at our discretion, extend this period for up to a further three months. If you or the Company decide to terminate your employment during your probationary period, it is subject to a one months' prior notice period. On successful completion of your probationary period, you will be informed in writing and the notice period increases to three months on either side".

15. On 31 January 2017, the Claimant and Mr Amos had a meeting to discuss his progress. This was halfway through his probation period. Mr Amos registered various concerns about the Claimant's performance and emphasised that these would need to be addressed in order for the Claimant to pass his 6 month probation period and that it was his responsibility to make this happen.

16. On 14 March 2017, the Claimant emailed Mr Amos to explain that he had sustained a leg injury and would not be able to travel into the London Office (for the most part the Claimant worked from home). Mr Amos said this was fine and gave the Claimant a choice of dates for his six month review meeting which was due to take place to discuss the Claimant's position with the Respondent going forwards. The meeting had to be rearranged for a number of reasons. It did not in the end occur until 18 May 2017. As noted, Mr Amos terminated the Claimant's employment at that meeting.

The Law

17. In relation to interpretation of contractual terms, I was referred to the judgment of Lord Neuberger in *Arnold v Britton and Others [2015] AC 1619* at paragraphs 15 and 17 as to how courts should approach the construction of contractual terms:-

> "15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffman in *Chartbrook Limited v Persimmon Homes Ltd [2009] AC 1101*, para 14. And it does so by focusing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v)

commercial common sense, but (vi) disregarding subjective evidence of any party's intentions …

17. The reliance placed in some cases on commercial common sense and surrounding circumstances (e.g. in *Chartbrook [2009] AC 1101,* paras 16 – 26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision."

(The court in Arnold was interpreting a lease (hence some of the references in the above which will not be relevant to this case), but the relevant provisions are just as applicable in the interpretation of an ordinary contract.)

18. I was also referred to the speech of Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society [1997] UK HL 28*, in which he said at p913:-

"The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even, as occasionally happens in ordinary life, to conclude that the parties must, for whatever reason, have used the wrong words or syntax."

19. I was also referred, by both Mr Baker and the Claimant, to the case of *Przybylska v Modus Telecom Ltd* (Unreported, EAT, 6 February 2007). At paragraphs 3 and 4 of the judgment, HHJ Burke QC set out the relevant contractual terms. The EAT rejected the ET's decision to imply a term into the contract that the Claimant would "receive some indication from the Respondent, by word or deed, that the probationary period had been successfully completed within a reasonable period of the expiry of the three month period."

20. By contrast, the Respondent in this case is not seeking to persuade me to imply a term into the Claimant's contract; rather it relies on the interpretation of the express contractual provision. Furthermore, the terms of the probationary period clause in *Przybylska* were very different from the terms in Clause 1.3 of the Claimant's contract. The terms in *Przybylska* read:-

"The first 3 months of your employment will be regarded as your probationary period. During this time, the period of notice required by either party will be 1 week. Notice given must be in writing.

The company reserves the right to extend your initial 3 month probationary period and one-week notice period where circumstances may not have allowed an objective assessment of your performance to be made."

21. There are several elements of Clause 1.3 which are not contained in the clause in *Przybylska*, and in particular the provisions of the last sentence of Clause 1.3, which state that "On successful completion of your probationary period, you will be informed in writing and the notice period increases to three months on either side."

22. For completeness' sake, Mr Baker also referred me to an extract from the IDS Employment Law Handbook on employment contracts and wages, in relation to construction of express terms in the context of wages and an example of an Employment Tribunal case given there. That example is in summary form only and the actual full case is not available. The extract in the IDS Employment Law Handbook states:-

> "*Sherwood v KW Linfoot plc ET Case No. 07466/95*: S was employed as a finance director. His initial salary was £23,500, but his letter of appointment provided that this would be increased to £25,000 "upon the successful completion of a three month probationary period". The employer did not give S a pay rise at the end of his probationary period, arguing that he had not successfully completed his probation because his performance was unsatisfactory. An employment tribunal decided that the term "successful completion" merely meant survival to the end of the probationary period. From the end of the probationary period, S was contractually entitled to an annual salary at the rate of £25,000."

23. Mr Baker having drawn this extract to the attention of the Tribunal, the Claimant submitted that it should be relied on in the interpretation of the Clause in his contract.

Conclusions on the Issue

24. I make the following conclusions, applying the law to the facts found in relation to the agreed issues.

25. Both parties agreed that this case was a matter of contractual interpretation. Essentially, the Respondent's position was that, at the date of the Claimant's dismissal, Clause 1.3 entitled the Claimant to be paid only one month's notice as he had not successfully completed his probationary period. The Claimant's position was that, at the date of his dismissal, pursuant to Clause 1.3 of his contract of employment, he was entitled to be paid three months' salary in lieu of notice as the six month probationary period had elapsed.

26. I accept that the relevant law on interpretation is contained in *Arnold* and in *Investors Compensation Scheme*.

27. In terms of the natural and ordinary meaning of Clause 1.3 (as referenced in *Arnold*), the final sentence of the Clause is key and provides that "On successful completion of your probationary period, you will be informed in writing and the notice period increases to three months on either side". I accept Mr Baker's submission that the Claimant's interpretation seeks to ignore the natural and ordinary meaning of the sentence and would need certain words in that sentence to be removed in order to be feasible, such

that is simply said "On completion of your probationary period, the notice period increases to three months on either side".

28. The words, I accept, cannot, however, be ignored. "Successful" implies a qualitative assessment of the probationary period. It must serve a purpose. If the Claimant's interpretation was right, "successful" could be replaced with the words "bare" or "simple" or "any" and the Clause would have the same meaning and, I accept, that cannot be correct.

29. Furthermore, the words "you will be informed in writing" must have some meaning. If the Claimant's interpretation were correct, they would be completely otiose. I accept that the Claimant is capable of assessing when the six months has elapsed and, on that basis, he would not need to be "informed in writing" of the same. The only logical meaning of the words is that they refer back to the use of the word "successful" in the former part of the sentence. Thus, I accept, a qualitative standard is required before the notice period increases to three months. Furthermore, a notice informing the Claimant in writing is also required (and none was given). The Clause would have been written very differently if only a quantitative length of service was required to achieve the greater notice.

30. In terms of the overall purpose of the Clause (as referenced in *Arnold*), I accept that the purpose of the Clause was to provide for a probationary period in order to test the qualitative suitability of the Claimant for the Respondent's business. The impact of the probationary period is confined to the extent of notice that is required. Only if the Claimant successfully passed being "monitored" would he be "informed in writing" that he had successfully passed the probationary period. The contractual requirement to inform the Claimant in writing of the fact that he passed his probationary period has no other purpose but to confirm this and to confirm entitlement to the increased notice period. Passing probation makes no other difference to the Claimant's terms and conditions. Accordingly, notice cannot be increased until the Claimant has been informed in writing and I accept that the only viable interpretation of the fourth sentence is that the increase in notice period is contingent on the Claimant being informed in writing that he has successfully passed his probationary period.

31. In terms of the facts and circumstances known or assumed by the parties at the time that the document was executed/commercial commonsense (as referred to in *Arnold*) I accept that the facts and circumstances known at the time that the document was executed must have included that the probationary period was provided for in order to prevent the Claimant achieving a comparatively high notice period (three months, when he was under one year's service) if he was unsuitable for employment, and that an active decision on the Claimant's suitability would be required to be made.

32. I accept Mr Baker's submission that it cannot make commercial or linguistic sense to construe the contract such that the mere passage of time allowed

the Claimant to "successfully" complete his probation, when the written notice had not been sent.

33. As noted, the decision in *Przybylska* was about whether the Employment Tribunal should have implied a term into the contract; that is not the case here, where what we are concerned with is a matter of interpretation of the express term. However, I have also noted that the clause in *Przybylska* is very different. That clause does not contain the extent of qualitative assessment which is clear in the Clause in the Claimant's contract ("performance and suitability for continued employment", "monitored", "successful completion", "you will be informed in writing" etc). There is a reference in the *Przybylska* clause to an "objective assessment of your performance to be made" but essentially the emphasis there is on the employer having the option to extend within the original three month period (which it did not do); by contrast, on a reasonable interpretation of Clause 1.3, there is a requirement for the Claimant to be informed in writing before the notice period increases to three months. The two clauses are not therefore comparable and the clause in *Przybylska* and the judgment in that case do not therefore impact upon the above analysis of Clause 1.3.

34. In his submissions, the Claimant placed a lot of emphasis on the word "during" in the Clause, suggesting that all that was required was for the six months to expire for him to become entitled to three months' notice. However, that is to take the word (which is in the first line of the Clause), out of context with the rest of the Clause. If one looks at it in context, the reasonable interpretation is as set out above.

35. I do not consider the Employment Tribunal case of *Sherwood* to be relevant to this decision. Firstly, it is an Employment Tribunal decision and is not therefore binding on me. Secondly, it is a five line extract from the IDS Employment Law Handbook and we do not have the full facts of that case or the entirety of the clause in question before us, so it would be very dangerous to draw any conclusions from it. Thirdly, it does not appear to have the key wording set out in Clause 1.3 of the Claimant's contract about being informed in writing, which is a crucial distinguishing factor. Fourthly, I accept Mr Baker's submission that, if it really was suggesting that the words "successful completion" in all circumstances merely meant survival to the end of the probationary period, that interpretation is wrong (and all the more so in the context of the detailed provisions of Clause 1.3 and the requirement to be informed in writing of successful completion of the probationary period).

36. The Claimant made some submissions about mistakes in the dismissal letter that was given to him by the Respondent indicating that the Clause should be interpreted in the way that he suggests. However, that is not relevant. None of the mistakes in the dismissal letter which may have been made by the Respondent and which I was taken to affect the interpretation of the Clause in the contract.

37. In short, I find that there needed to have been a communication in writing to the Claimant of successful completion of the probationary period for the notice period to change from one to three months. There was no such communication. The Claimant was therefore entitled to just one month's notice, for which he was paid, and there was therefore no breach of contract.

38. The Claimant's breach of contract complaint therefore fails.

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Employment Judge Baty

Dated: 19 October 2017