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# EMPLOYMENT TRIBUNALS

**Claimant:** Miss Amy Claire Monk  
**Respondent:** Affinity First Ltd  
**Heard at:** East London Hearing Centre  
**On:** 10 August 2018  
**Before:** Employment Judge Burgher

## Representation

**Claimant:** Mr S Stanton-Dunne (Solicitor)  
**Respondent:** Mr N Shah (Solicitor)

## JUDGMENT

The judgment of the Tribunal is that:-

1. The Tribunal does not have jurisdiction to consider the Claimant's claim for unfair dismissal as she does not have 2 years continuous employment. Her claim for unfair dismissal is therefore dismissed.
2. The Claimant's claim for breach of contract in respect of notice pay fails and is dismissed.

## REASONS

### *Issues*

1 At the outset of the hearing the statement of issues agreed between the parties was considered. There was an issue of jurisdiction in relation to whether the Claimant has the requisite period of continuous employment to present a complaint for unfair

dismissal under section 108 of the Employment Rights Act 1996. This required an assessment of the effective date of termination. Therefore I heard evidence first from the Claimant.

2 If the Claimant established that she had the required 2 years continuous employment I would then consider whether the Claimant was dismissed by the Respondent.

3 If the Claimant was dismissed by the Respondent, I would then consider whether the Claimant was unfairly dismissed. This would include consideration of whether the dismissal was fair and reasonable in all the circumstances.

4 Whether the Claimant was provided with the right amount of payment in lieu of notice. This was dependent on the determination of:

- 4.1 The effective date of termination; and
- 4.2 How payment in lieu was to be calculated.

### ***Evidence***

5 The Claimant gave evidence on her own behalf. The Respondent called Mr Edward Bromley – Martin, Company Secretary and Mr Arturo Zindel, Chief Executive Officer to give evidence on its behalf. All witnesses gave evidence by way of witness statements and were subject to cross examination and questions from the Tribunal.

6 The Respondent also sought to rely on an affidavit witness statement of Mr Chris Kenny, Business Manager, who was unable to attend the Tribunal due to a pre-booked vacation. I placed limited weight on the affidavit in view of Mr Kenny being unable to give evidence in the Tribunal and be subject to cross examination. I also noted that this affidavit reflected what Mr Edward Bromley – Martin attested to and as such concluded that it would be appropriate to focus on resolving the respective disputes between the oral evidence given.

7 In addition to witness evidence I was referred to relevant pages in an agreed hearing bundle consisting of 168 pages.

Procedural matter

8 Approximately 1 hour and 15 minutes into the cross examination of Mr Edward Bromley Martin by Mr Stanton Dunne, I stopped Mr Stanton Dunne simply reading out a lengthy extract of what was recorded in the minutes of the notes of the meeting. I stated that Mr Stanton Dunne should ask questions of the witness and not simply read out what was recorded in documents which he had been prone to do during his cross examination by that stage.

### ***Facts***

9 I have found the following facts from the evidence.

10 The Claimant commenced employment with the Respondent on 11 January 2016 as a sales consultant to sell income protection to cover long term illness to

members of the teaching union, the Association of Teachers and Lecturers.

11 The Respondent was a start up company, established in November 2015, and its income protection insurance for the United Kingdom market was new. Whilst there was a track record for insurance in the Republic of Ireland, in order to succeed the Respondent need to establish a presence in the United Kingdom. This meant that it needed to employ sales consultants who were prepared to engage in extensive daily travel to make presentations in schools and have one to one meetings with individual teachers with a view to signing up income protection policies.

12 The sales consultant role was challenging and resulted in the Respondent having a high turnover of sales consultants. The usual length of service for sales consultants whilst the Respondent was seeking to establishing itself was between 6 and 12 months. The Claimant was successful in lasting for a longer period.

13 One of the key performance indicators for the Respondent was to have 10 one to one meetings per week. Converting the one to one meetings to signed up income protection policies followed on from that.

14 The Claimant developed into the sales consultant role and was able to create sales. She had a very good sales figure for the first and second quarter of 2017 but the Respondent remained concerned that she was not reaching the one to one target levels. However, the Claimant was unhappy at the extent of travel she would have had to undertake in order to reach the one to one target and consistently expressed this to the Respondent.

15 In June 2017 the Respondent's requirement for increased one to one visits and the need to travel requirement was reiterated to the Claimant during an informal discussion with Mr Zindel where the Claimant was asked to reflect on her suitability for the role.

16 On 16 October 2017 the Claimant was issued with a 'Letter of Concern'. The letter ended by saying that the Respondent needed to see a noticeable improvement in respect of one to one's in the next 3 week period and that she would be reviewed on this point again.

17 Weekly reviews took place, as they did with all staff, and the Claimant did not achieve the required improvement in one to one's. However the Respondent did not follow its written performance management process which would have required warning with possibility of dismissal, final written warning with warning of dismissal and subsequently dismissal if no improvement was made. However, the Respondent's written performance management process says that it can be disapplied in respect of short service staff. Mr Zindel said that employees with less than 2 years employment are short term staff.

18 On 2 January 2018 the Claimant was invited to attend to a meeting. The Claimant believed that it would be a standard sales meeting but was told that by Mr Kenny that she was going to have an annual review. Mr Bromley – Martin attended the meeting and took notes. During the meeting the Claimant expressed her concern about the extent of travel and but that she could be more relaxed in respect of travel going forward and throwing herself in the role. Mr Kenny stated that he felt that the Claimant's

personality was such that the Respondent did not feel the Claimant would improve to the required level of sales results and that it would be unfair to the Claimant and the Respondent that things could drastically change to achieve this. He stated that he felt it was the right time for the Claimant and the Respondent to part right here and now as the Respondent did not think that the Claimant's results and work ethic were correct for the role going forward.

19 The Claimant was shocked and upset by this and the meeting was adjourned for 10 minutes. When the meeting resumed the Claimant stated that Mr Kenny's comments had not been unfair and made sense but that she had put nearly 2 years of her life and career into working for the Respondent. Mr Kenny responded that it was not a waste as he felt the Claimant had learnt a lot during the 2 years and this would set her up well for future roles. Mr Kenny offered to help the Claimant in any way he could in terms of providing a reference or any advice on future roles. The meeting was halted for consultation with Mr Zindel and the dismissal was confirmed. When the meeting restarted the Claimant stated that she did not want to tell future employers that she had been fired from her previous role and discussion ensued to record the termination as a termination by mutual agreement to part ways instead. It was agreed that payment would be made in lieu of notice and that the Claimant should liaise with Mr Bromley Martin to return company equipment. Mr Kenny confirmed that he would assist the Claimant with her CV and provide a reference for her future roles. The Claimant was thanked for her efforts to the Respondent and she was wished well in all her future endeavours.

20 The Claimant sent Mr Bromley-Martin an email on 2 January 2018 at 15.40 confirming that she would return the Respondent's company property and asked for her final pay slip to be sent to her personal hotmail email account. She also asked to buy the company iphone. The Claimant also sent an email to Mr Kenny on 2 January 2018 at 15.51 thanking him for the time and support he gave her over the last 2 years and for the offer of support to find a new job and provide a reference.

21 In her oral evidence the Claimant maintained that the offer of support was to keep her employed until she was able to find another job. I do not accept this and I find that the Claimant and the Respondent were completely clear that her employment came to an end at the meeting on 2 January 2018. There was a clear and unequivocal end of the contract on the 2 January 2018 and not as suggested by the Claimant on an intention to dismiss her on some future unspecified date when she was able to find another job.

22 The Respondent wrote to the Claimant by letter dated 8 January 2018 writing to confirm the agreement reached between them regarding termination at the meeting on 2 January 2018. The letter stated that at the Claimant's suggestion the Respondent agreed to her request that they part by mutual termination. The letter stated that this will take effect immediately and the Claimant would be paid 4 weeks pay in lieu of notice.

23 The Claimant responded to this letter by letter dated 8 January 2018 stating that it was not her understanding as she did not wish to end her employment with the Respondent and that she did not believe she had any choice in whether she wished to remain in the role and that she was being dismissed on 2 January 2018. The Claimant asked for confirmation of the reason for her dismissal and notice pay of 1 month.

24 On 9 January 2018 the Respondent wrote to the Claimant stating that the letter of 8 January 2018 was formal notice of termination of her employment. This letter stated that the reasons for termination were outlined in the meeting of 2 January 2018, that the Claimant would be given one months pay in lieu of notice from 2 January 2018 and that the mobile phone would be deducted from her final salary by way of salary sacrifice. The Claimant was sent her final payslip by Mr Bromley Martin on 17 January 2018 that confirmed the Respondent's position.

### ***Conclusions***

25 Mr S Stanton-Dunne made forceful submissions that the Claimant did not receive 'formal notice' of her termination until the Respondent's letter dated 8 January 2018. As such the Claimant's effective date of termination was extended by one week to 15 January 2018 and she had the request 2 years continuous employment to bring an unfair dismissal claim. He also stated that by paying in lieu of notice from 2 January 2018 instead of 8 January 2018 there was a shortfall in notice payment.

26 Whilst confusion resulted from the Respondent's letter of 8 January 2018 this letter referred to the 2 January 2018. On the 2 January 2018 the position clearly understood by both parties was that the Claimant's employment was being brought to an end on that date. The subsequent loosely worded correspondence from the Respondent on 8 and 9 January 2018 did not alter this. – further to meeting 131

27 Therefore the Claimant's employment contract came to an end on 2 January 2018 and she does not have 2 years continuous employment. The Tribunal does not have jurisdiction to consider the Claimant's claim for unfair dismissal pursuant to section 108 of the Employment Rights Act 1996. Her claim for unfair dismissal is therefore dismissed.

28 The Claimant's claim for breach of contract in respect of notice pay fails and is dismissed as she has been paid the proper sums from 2 January 2018.

Employment Judge Burgher

28 August 2018