EMPLOYMENT TRIBUNALS

Claimant: Ms D Bramall

Respondent: SBS Total Facilities Management Ltd (in creditors voluntary liquidation)

HELD AT: Liverpool **ON:** 14 January 2019

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimants: Not in attendance – by written submissions
Respondent: Not in attendance

JUDGMENT

The judgment of the Tribunal is that the respondent is ordered to pay to the claimant damages for wrongful dismissal in the sum of £3750.00 by way of unpaid notice pay.

REASONS

Preamble

1. This is a liability hearing to determine the claimant's wrongful dismissal claim for breach of contract received on 11 October 2017 following Early ACAS Conciliation on 10 October 2017. It has taken this long to get to final hearing as a result of a number of adjournments.

2. Neither party have turned up to today's hearing and the Tribunal considered it was just and equitable for the proceedings to in held in their absence, telephone contact having been made with the claimant who indicated she preferred to rely on written submissions and the documents already before the Tribunal. The Tribunal

took into considered written representations and documents submitted by both parties.

3. The claimant bears the burden of proving her claim, and having considered the documentation on file coupled with up-to-date company searches, the Tribunal took the view a further adjournment not appropriate, and the Tribunal can decide the claimant's claim in her absence.

Facts

4. The claimant was head-hunted and whilst she was in secure employment offered a job as full-time SBS Finance Manager-accounts controller on the 14 July 2017 following an interview. She handed in her notice on 14 July 2017 and turned up to start her new job on 23 August 2017 only to be told that the offer had been withdrawn. The claimant was not paid for the day she turned into work for the respondent. Fortunately, the claimant was able to secure alternative employment in 5.5 weeks. The claimant's annual salary was agreed at £45,000 per annum. There was no reference to the notice period, and whether it was limited to statutory notice or otherwise. The claimant's package was described as a "Executive Employment Package" and the Tribunal took the view, bearing in mind the amount of salary and claimant's responsible position as finance manager, a minimum of one-months' notice would have been reasonable.

5. The claimant has produced an original letter dated 14 July 2017 written on the respondent's headed notepaper marked "SBS Job Specification & Job Offer." The letter confirmed the terms agreed in addition to the claimant's start date of 23 August 2017 after she had given formal notice to her previously employer that included one-week's holiday. The Tribunal considered the Facebook messages reflecting the steps taken to interview stage, and it was satisfied a binding contract had been entered with the respondent only.

6. The respondent denied the claimant had been offered and accepted a job with it, maintaining in the ET3 it was Selwyn building Services Ltd ("Selwyn") that had made the offer subsequently retracted due to a downturn in business. Selwyn went into administration on 24 August 2018 until the stock and assets were purchased by the respondent on 24 August 2017. There was no evidence before Tribunal that the claimant had contracted with Selwyn, the contemporaneous documentation reflects the contracting parties were the claimant and the respondent, and so the Tribunal finds.

7. John Davies, HR advisor for the respondent, wrote to the Tribunal on 10 April 2018 asking the Tribunal to reject the claimant's claim for a number of reasons, including the fact she was not employed by the respondent but Selwyn. He referred to a document DB1maintaining the claimant was sent an offer letter by Selwyn. The Tribunal was also referred to document DB2, 3 and 4. None of these documents were attached. It was argued if the Tribunal found there was a breach of contract, the claimant's damages would not be 5.5 weeks payment totalling £4759.00 but £0.00 because she had less than one-months continuity of employment.

8. The claimant responded in an email sent 11 April 2018 denying she had ever received an offer letter from Selwyn's.

9. In the 1 June 2018 the respondent was placed into creditors voluntary liquidation and since that date the Tribunal has received no communications from the respondent, apart from the insolvency practitioner confirming the liquidation. Selwyn was dissolved on 30 November 2018.

Conclusion

10. There is no written contract of employment, and nor is there is statement of terms of conditions of employment. The letter of 14 July 2019 reflects an offer was made to the claimant, which she accepted and on the basis of that acceptance turned into work on 23 August 2017. There existed a binding contract between the parties. The agreement reached had not addressed the issue of notice pay, a fundamental part of a contract of employment, especially at executive level. There are occasions when the statutory notice period suffices; however, the Tribunal finds on the balance of probabilities that this is not one of them. The claimant's notice period in her original job was 1-month, she handed in her notice on 14 July 2017 (after receiving the offer letter and reaching a binding contract with the respondent) and the start date was agreed at 23 August 2017 which took into account one-week's holiday.

11. The Tribunal will not imply a term simply because it is a reasonable one. A term can only be implied if it can presume that it would have been the intention of the parties to include it in the agreement. In order to make such a presumption, it must be satisfied that: (a) the term is necessary in order to give the contract business efficacy, or it is the normal custom and practice to include such a term in contracts of that particular kind, or an intention to include the term is demonstrated by the way in which the contract has been performed, or the term is so obvious that the parties must have intended it.

12. The Supreme Court confirmed the tests of business efficacy and obviousness in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd and anor 2015 UKSC 72, SC*. Lord Neuberger, with whom Lords Sumption and Hodge agreed, pointed out that the test is not one of 'absolute necessity', and suggested that it might be more helpful to say that a term can only be implied if, without the term, the contract would lack 'commercial or practical coherence'.

13. There is a general presumption that the parties to a contract intended to create a workable agreement. If, therefore, it is necessary to imply a term in order to give business efficacy to the contract and make it workable, the Tribunal will be prepared to do so. In the claimant's case the Tribunal took the view for all those reasons set out above i.e. the fact the claimant was head-hunted, the length of notice she had to give on resignation, the substantial salary and status of her position, the parties would have agreed to a term relating to notice pay had they directed their minds to the matter, when the contract was entered in accordance with the 'officious bystander' test. A term relating to notice pay could be implied either on

the basis of business efficacy and under the 'officious bystander' test. In the claimant's particular circumstances, the parties would have included such a term in the contract had they applied their minds to it the claimant having not been sent a written contract or a statement of written particulars.

14. The implication of terms on the basis that the parties obviously intended them to apply is generally referred to as the 'officious bystander' test. The term derives from the case of *Shirlaw v Southern Foundries (1926) Ltd 1939 2 KB 206, CA*, where the Court of Appeal – in a decision subsequently affirmed by the House of Lords – held that a term could be implied in a situation where 'if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common "oh, of course"'. In practice, this means that a term will be implied if it can be said that it is so obvious that it goes without saying. The Tribunal is of the view it goes without saying the claimant's notice period would not be limited to the minimum statutory right, but a contractual notice of one-month until the stature minimum became relevant. A term setting out one months' notice is necessary to render the agreement workable and the Tribunal is satisfied, on balance, that the implied term is one which the parties would probably have agreed if they were being reasonable.

15. In conclusion, the Claimant was entitled to damages for breach of contract amounting to one month's salary. The respondent had offered the claimant the job and, when she accepted the offer, the parties had created a legally binding contract. To end the contract, the employer had to give the claimant notice of termination. As it had failed to do so the claimant was entitled to compensation equal to one month's notice which amounted to £3750 gross less lawful deductions of tax and national insurance, the Tribunal having deemed one month to be reasonable in the circumstances.

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Employment Judge Shotter
14.1.2019
JUDGMENT AND REASONS SENT TO THE PARTIES ON

18 January 2019

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FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2420935/2017**

Name of case(s): **Miss D Bramall** v **SBS Total Facilities Management Ltd (In Creditors Voluntary Liquidation) & Others**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **18 January 2019**

"the calculation day" is: **19 January 2019**

"the stipulated rate of interest" is: **8%**

MR J PRICE
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/collections/employment-tribunal-forms

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.