



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss P Fenlon

**Respondent:** G R Taylor Accountants Limited

**HELD AT:** Liverpool

**ON:** 11 January 2019

**BEFORE:** Employment Judge Horne

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr G Taylor, Managing Director

**JUDGMENT** having been sent to the parties on 24 January 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

### The issues

1. By a claim form presented on 8 October 2018 the claimant brought a claim for damages for breach of contract.
2. We established at the start of the hearing that there were two issues for me to decide:
  - 2.1. Whether it was initially agreed at the outset of the claimant's employment that her contractual entitlement to notice would be one month; and
  - 2.2. Whether it was a term of the contract that her entitlement to notice was conditional on her satisfactorily completing a probationary period.

### Evidence

3. I heard oral evidence from Ms Fenlon, who answered questions from me and from Mr Taylor. On the respondent's behalf, Mr Taylor confirmed the truth of a written witness statement and answered questions.

4. I also considered the witness statement of Tracy Bryant, who did not attend to give evidence. I could not give her statement as much weight as I could give to the evidence of the parties who gave evidence before me, because there was no opportunity to test her evidence by questioning.
5. In advance of the hearing, the respondent sent some documents which I read. During the hearing itself it transpired that the claimant had some relevant e-mails stored on her mobile phone. She showed me the documents on her phone and handed me some additional printed documents, all of which the respondent had an opportunity to read before we made further progress with the hearing.

### **Facts**

6. The respondent provides accountancy services. Its managing director is Mr Taylor.
7. On 23 May 2018 the claimant attended an interview for the role of Bookkeeper with the respondent, following an introduction by an employment agency. Her interviewer was Ms Tracy Bryant, the respondent's VAT bookkeeping manager. At that interview there was a discussion of a probationary period. Ms Bryant did not tell the claimant how long the probationary period would last. Rather, she told the claimant that the length of the probationary period would be up to Mr Taylor. She did not explain the significance of the probationary period, and she did not say what the terms of the claimant's contract would be in the meantime. She did not say anything about the period of notice to which the claimant would be entitled, either during her probationary period or once it had been completed.
8. On 24 May 2018, Ms Sarah Nichols, office manager, e-mailed the claimant to offer her the role. The offer came in the form of an e-mail with an attached draft contract. The covering e-mail did not mention any probationary period. The draft contract was also sent by post the same day, together with a printed offer letter. In the offer letter, Ms Nichols offered the role at a salary of £17,000 per annum, commencing on 4 June 2018.
9. The draft contract provided that the notice to be given by both the employer and the employee was one month.
10. Neither the offer letter nor the draft contract made any mention of a probationary period.
11. The draft contract left space for both the employer and employee to sign. The template set out extensive standard terms and conditions, but had not been populated with the claimant's personal information.
12. Also in the draft contract were incomplete terms relating to:
  - 12.1. Start date;
  - 12.2. Job title and location; and
  - 12.3. Salary and benefits;
13. The draft contract contained apparently completely-drafted terms relating to:
  - 13.1. Hours of work;
  - 13.2. Annual leave entitlement;
  - 13.3. Sick pay (subject to insertion of the respondent's name)

- 13.4. Health and safety;
  - 13.5. Expenses;
  - 13.6. Confidentiality (subject to completion of the respondent's name);
  - 13.7. Data protection;
  - 13.8. Disciplinary and grievance procedures;
  - 13.9. Equal opportunities (subject to completion of the respondent's name);
  - 13.10. Company property and redundancy.
14. There was no explanation given to the claimant of what would need to happen in order for the terms of the draft contract to come into effect.
  15. Later on 24 May 2018 the claimant accepted the offer of employment by e-mail. She did not sign the contract, but simply stated that she was "looking forward to starting on 4 June 2018".
  16. The claimant did indeed start work on 4 June 2018. She reported to Ms Bryant. Mr Taylor was not involved in her day-to-day management. There was no discussion of any probationary period or what it would entail. At no point during the first couple of months did Mr Taylor tell the claimant how long the probationary period was going to last. Nor did anybody else.
  17. I do not have to make any findings about the actual standard of the claimant's work. What is clear is that Ms Bryant was unhappy with it. By 6 August 2018 the situation had been escalated to Mr Taylor. He was told that the claimant had made a slight improvement, but her performance was still unsatisfactory. It was the view of Ms Bryant and Mr Taylor that the claimant should be given a further opportunity to improve.
  18. On 6 August 2018 Mr Taylor met with the claimant and discussed his concerns in relation to her performance. He told her that he would monitor the situation and review it in one month's time. Contrary to Mr Taylor's oral evidence, I find that he did not refer expressly to extending her "trial period" or make any other reference to her probationary period. My reason for preferring the claimant's account is that Mr Taylor's version does not appear in his witness statement. If Mr Taylor had said it, he would have known that it would be an important piece of evidence and would have been unlikely to have left it out. I would also have expected Ms Nichols' later e-mail of 31 August 2018 to have made some reference to her probationary period had it been mentioned.
  19. By 6 August 2018, the respondent was obliged to provide the claimant with a written statement of terms of employment. It did not provide her with such a statement.
  20. On 20 August 2018 the claimant secretly prepared a resignation letter and put it in her desk drawer. She never handed the letter to the respondent. The letter purported to give notice until 24 August 2018. In her oral evidence, the claimant gave an explanation for her draft letter having provided for such a short period of notice. She told me that she believed that she had to give one month's notice, and that she had meant for her notice to expire on 24 September. She intended to hand it in on 28 August 2018 (the day after the Bank Holiday), which would be 4 weeks before her notice was due to expire. According to her evidence, writing "24 August" on the letter was a simple mistake. This explanation is a little odd. It

not explain why she dated her letter 20 August. It is also strange that she would want to give four weeks' notice if she thought that the notice period was a calendar month. Her unconvincing account did make me wonder whether she was deliberately pulling the wool over my eyes. Was she trying to hide the fact that she believed her contractual notice provisions were subject to completion of a probationary period? I thought that possibility was unlikely. If her choice of dates was deliberate, she was planning to give 4 or 5 days' notice. Nobody had told her that she would have a 5-day notice period during her probationary period. It is possible that she knew that, in the absence of a written contract, her statutory minimum notice obligation would be one week. But there is no evidence that the claimant was sure of her ground, especially bearing in mind that she never handed over the letter. It was only 8 days later that she gave one month's notice. Nothing happened in those intervening 8 days that would explain why she would suddenly change her mind about the notice she was required to give. The most likely explanation in my view is that, around 20 August 2018, the claimant was confused about what her notice entitlement and obligations were. I do not particularly blame her for being confused. The draft contract had not been signed and nobody had followed through with Ms Bryant's initial mention of a probationary period.

21. On 24 August 2018 the claimant attended another meeting with Mr Taylor. She was expecting a decision from him about the future of her employment. The respondent argues that the claimant's anticipation of such a decision meant that she was consciously waiting to hear whether or not she had passed her probationary period. I do not agree. Whether she thought she was in a probationary period or not, it was quite clear to her from 6 August 2018 onwards that Mr Taylor was considering whether or not to dismiss her for perceived poor performance. She was a recently-appointed employee who had no protection against unfair dismissal, so it would not be surprising that no formal procedures were being followed. I also accept the claimant's evidence that she mistakenly believed that she would acquire additional rights if she reached 12 weeks' employment, although this is unlikely to have weighed on her mind nearly as much as the question of whether she would have a job at all.
22. The 24 August 2018 meeting was brief. The claimant asked Mr Taylor what was happening as she needed to know her situation. Mr Taylor said that he would need to speak with Ms Bryant, who was then on holiday, in order to see how the claimant had progressed. He informed her that they would discuss the matter on Monday 3 September.
23. On 28 August 2018 the claimant gave one month's notice of termination. On receipt of that notice, Mr Taylor and his Office Manager, Ms Nichols, thought that the claimant was taking advantage of the respondent by trying to squeeze out an extra month's pay. The claimant was asked to leave the office immediately, although she was not told anything about when her employment would come to an end.
24. By e-mail on 31 August 2018, Ms Nichols complained to the employment agency about the capabilities of the claimant. The e-mail set out a history of their dealings with her, including the meeting "at the beginning of August", which must have been the 6 August 2018 meeting. Ms Nichols did not make any mention of any probationary period.

25. By the time the claimant handed in her notice of termination, she had accrued 7 days' annual leave, but had already taken 11 days as holiday. She had therefore taken 4 more days than her entitlement.
26. In a letter dated 3 September 2018, Mr Taylor acknowledged the claimant's resignation letter. The final paragraph stated,

"We propose to pay you up to 7 September 2018 without deduction for any overpaid holidays which will be remitted on Tuesday 11 September 2018. We therefore are accepting a nine day notice period from yourself."
27. Correspondence continued with the parties' positions becoming more entrenched. By letter dated 11 September 2018, the respondent asserted, for the first time, that her draft contract had been subject to a two-month probation period.
28. During his oral evidence, Mr Taylor told me that, had he simply allowed the claimant's notice period to expire, rather than shortening it, he would still have "written off" the claimant's overpaid holidays.

### **Relevant law**

29. Contracts of employment may be oral or in writing. They need not be signed in order for their terms to be binding.
30. Interpretation of the terms of a contract is an objective exercise. The aim is to ascertain, objectively, what the terms were intended to mean. In this regard, the parties' subjective intentions are not important.
31. Where the wording of an express term is unclear, the tribunal must ask itself what a reasonable observer, knowing the full context, would have understood the words to mean.

### **Conclusions**

32. In my view the correspondence on 24 May 2018 was ambiguous. The combined effect of Ms Nichols' e-mail, offer letter and draft contract could have conveyed two different meanings to a reasonable recipient:
  - 32.1. The first, which is what the claimant contends, is that the claimant was being offered employment on the terms set out in the draft contract. All the claimant needed to do was to indicate her agreement to become an employee and the terms in the draft contract would become binding.
  - 32.2. Alternatively, those documents could have meant that the claimant was being offered employment on some other basis, but that the full terms of the draft contract would not come into effect until the claimant's details had been entered and the parties had signed the completed version. This is the respondent's interpretation.
33. I must therefore decide what a reasonable person, having observed the job interview, would have made of the correspondence.
34. The main factor pointing towards the respondent's interpretation is the incomplete version of the draft contract. On its own, the draft contract could have applied to anybody. To make sense on its own, it needed to be populated and signed.
35. On the other hand, I think there are powerful reasons for reaching the interpretation on which the claimant relies:

- 35.1. The more important gaps in the draft contract were supplemented by the offer letter, which bore the claimant's and respondent's names, the start date, role title and the salary for the role.
- 35.2. This was a document prepared by the respondent. It gave the reasonable impression that it contained the terms that the respondent wanted to apply to the employment.
- 35.3. The reasonable reader of the draft contract would believe that most of the terms of the draft contract were of the kind that the respondent would want to apply to the claimant's employment from day one. Examples are working hours, health and safety, expenses, data protection, confidentiality, equal opportunities and return of company property. It is inherently unlikely that an employer would want to wait for some unspecified future event, or until the document had been signed, before these terms became binding.
- 35.4. If the respondent's interpretation is correct, it begged the question, "What terms will apply to the employment whilst we wait for the contract to be signed?" Those terms were never explained. By 6 August 2018 the claimant was entitled to a statement of particulars of her employment. No statement was given to her explaining what her terms were, if they were in any way different from the draft contract. That lends support to the view that the parties believed that the terms of the draft contract already applied to the claimant's employment.
- 35.5. It is also surprising that, if the terms of the draft contract were conditional upon the claimant completing a probationary period, nobody told the claimant how long the probationary period was going to be. It is still more surprising that none of the correspondence accompanying the draft contract mentioned a probationary period as being a pre-condition.
- 35.6. Ms Bryant's mention of a probationary period (of unspecified length) during the interview does not, in my view, significantly alter the analysis. It was by no means obvious that, by indicating that there would be a probationary period, Ms Bryant was telling the claimant that the contractual notice periods during the probation period would be different to what they would be when the probationary period was completed. An accountancy firm might need a month to recruit a replacement for probationary bookkeeper, just as they might need a month to replace a longer-serving one. Conversely, the offer of a minimum notice period may act as an enticement to new recruits who have to give up their existing job to work for the respondent.
- 35.7. The respondents' actions from 6 August 2018 to 11 September 2016 are also consistent with their shared belief that the existence of a "probationary period" or "trial period" had no particular legal significance. If Mr Taylor thought the existence of a probationary period did have some effect on the claimant's terms of employment, it is likely that he would have mentioned it.
36. I therefore find, on balance, that Ms Nichols' communications on 24 May 2018 would have been reasonably understood to amount to an offer of employment on the terms set out in the draft contract. By accepting the offer and agreeing to the start date, the claimant was also accepting those terms, including the term

entitling her to one month's notice. That term was not subject to completion of a probationary period.

37. The respondent's letter of 3 September 2018 amounted to notice of termination. The letter indicated that the claimant would be paid up to 7 September 2018 and purported to accept 9 days' notice. This was against the background of already having sent the claimant away from the office with no suggestion of her ever returning. What the respondent was really doing was giving 4 days' notice of termination. This was a breach of the claimant's contract: she was entitled to one month.
38. The claimant is entitled to damages to restore her to the position she would have been in had the respondent not breached the contract. Damages are to be calculated on the basis that the respondent would have allowed the contract to terminate in the manner most advantageous to the respondent, provided that it was lawful. In this case, the speediest means by which the respondent could have achieved lawful termination was by allowing the claimant's notice to expire. Had it done so, the claimant would have received her net salary for the period 8 September to 28 September 2018.
39. It was agreed that a day's net pay was £57.46. The parties further agreed that the claimant's damages should be £956.66 less two days' net pay to reflect the claimant's overpaid holidays. The resulting total was £841.74.

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Employment Judge Horne  
Date: 8 February 2019

REASONS SENT TO THE PARTIES ON

18 February 2019

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FOR THE TRIBUNAL OFFICE

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