



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE K ANDREWS (sitting alone)

BETWEEN:

Ms T Oksanen-Wills

Claimant

and

The Academy of Contemporary Music Limited

Respondent

ON: 22 January 2019

Appearances:

For the Claimant: In person

For the Respondent: Mr O Sussat, Director

REASONS FOR JUDGMENT DATED 22 JANUARY 2019 PROVIDED AT THE REQUEST OF THE CLAIMANT

1. This is a claim of breach of contract following the termination of the claimant's contract of employment.
2. I heard evidence from the claimant and Mr O Sussat, Director of the respondent, and considered documents provided by both parties.

Relevant Law

3. The Tribunal has jurisdiction to consider claims of breach of a contract of employment where that claim arises or is outstanding on termination of the employee's employment. A number of claims are expressly excluded from this jurisdiction including claims in respect of personal injury (Extension of Jurisdiction (England & Wales) Order 1994).

Findings of Fact

4. Having assessed all the evidence, both oral and written, I find on the balance of probabilities the following to be the relevant facts.
5. The claimant commenced employment with the respondent on 9 October 2017. She was given one week's notice on 9 May 2018 by the respondent on the basis that she had not completed her six-month probationary period whereas the claimant says that her probationary period had in fact completed and therefore she is entitled to 3 months' notice. The issue to be determined therefore is the correct interpretation of the relevant contractual provision and its application to the facts.
6. The claimant signed a contract of employment on 19 September 2017. That contract at clause 3.2 provided that:

'The first 6 months of your employment with the Company are your probationary period. The Company reserves the right to extend this period at its own discretion. During this probationary period your employment may be terminated with 1 week's notice from either side'

and at clause 3.3:

'Following satisfactory completion of the probation period, this Agreement shall...continue unless and until it is terminated... [on] not less than three months calendar months' notice in writing.'

7. Also at clause 12 it states that the employer has various policies and procedures applicable to the employment, which may be varied from time to time and elsewhere in the contract there is an obligation on employees to keep themselves up-to-date with such policies. The respondent accepts that they cannot demonstrate that this particular policy was brought to the attention of the claimant although they say that on the claimant's own case, described below, that she was aware of it.
8. The claimant's six-month probationary period was due to end on 9 April 2018. She had successfully passed a first probation review roughly halfway through that period.
9. A probation review had been pencilled in with Mr Bennett-Hart for Tuesday 10 April. For various reasons, principally the fact that he was leaving, Mr BennettHart was unable to complete that and he informed the claimant of that on 6 April when he said he was not able to sign off probations any more and suggested that she pursued it with Mr Sweeney. Accordingly the claimant emailed Mr Sweeney, also on 6 April, and asked him:

'Would you be able to do this on his [Tim's] behalf please? Another day is also fine.'

The claimant says that she received no substantive reply to that and therefore she says her probation period was successfully completed.

10. On 18 April the claimant emailed one of her direct reports, Mr Briscoe, regarding his employment position. In that email she said:

'Although your probation period has finished in terms of time, it is not formalised until your second probation review has been approved. I can set a time to do this with you...'

11. The claimant confirmed that she understood this to be the position based upon a conversation she had with HR. This is what is relied upon by the respondent to show that the claimant was aware of the probation policy. I do not agree with the respondent that this amounts to the same as actually having seen the policy itself, although I do agree that it does show what the claimant understood to be the case at the time which clearly was that mere expiry of the probation term alone did not mean probation was successfully completed but a step still had to be taken to approve it.

12. In any event the claimant attended a meeting on 2 May with Mr K Clements the respondent's Executive Chairman and others. She says, and I accept her evidence as there is no evidence to the contrary, that she was not explicitly told that that this meeting was her probation review meeting. However it is clear from an email that she sent to Mr Clements on the following day that she understood she had been terminated at that meeting because her probation review had not been approved. She said:

'I do understand your reasons for not approving my probation review and the outcome that followed.'

13. The claimant's explanation for why she now argues that she had in fact completed her probation successfully and therefore was entitled to 3 months' notice is that although she had been told this was the position by HR at the time, having reviewed and researched the position after termination she has concluded that that approach is incorrect.

Conclusion

14. It is clear on the face of the contract that the notice period during the probationary period is one week and thereafter three months. It is also clear that the respondent reserves the right to extend the probationary period of six months at its own discretion. The contract and the policy are silent on whether and how any such extension should be communicated to the employee. It must be implied however that the employer will communicate to the claimant an extension in some way. There is no evidence that there was any such communication of extension to the claimant.

15. What is also clear however is that respondent's practice was that mere expiry of the probationary period did not equate to its satisfactory completion. That is evident from the claimant's own email to Mr Briscoe which was based upon advice she had obtained from HR.

16. It is also clear that on 6 April the claimant had been expecting her probation review meeting to take place on 10 April, a day after the period had expired. She was also anticipating holding that review with somebody else and was willing to

have that other review on another day. This is all in keeping with the respondent's practice and the claimant's understanding of the practice at that time.

17. Further, when the claimant was actually terminated on 2 May she accepted that it was because her probation period had not been satisfactorily approved.
18. For the claimant to succeed in her claim, therefore, I would have to accept the argument that although that was her understanding at the time and was in keeping with what she understood to be the respondent's practice at the time, in fact a strict reading of the contract does not allow that to be the case and that mere expiry of the term without any formal extension of probation meant that she had successfully completed her probation period.
19. I do not accept that argument. I do agree that it is unfortunate that the contract and the corresponding policy do not make it clear that mere expiry of the term does not mean probation is passed but to find that that was the meaning of the contract would require an unreasonable interpretation of it. Although there would have to be an eventual cut off point if the respondent continued to be silent about probation, on these facts the claimant could not reasonably assume that her probation had been approved. The claimant clearly knew that her probation needed to be approved, she expected that to be done outside of the strict six-month time period and when her contract as terminated just under a month later, she accepted that it was related to her probation.
20. In all the circumstances of the terms of the contract and the facts at the time, I conclude that the claimant's probationary period had not been successfully completed and therefore she was given the correct period of notice.
21. Her claim of breach of contract fails.

Employment Judge K Andrews
Date: 4 April 2019