



EMPLOYMENT TRIBUNALS

Claimant:
Mr. Nigel Moul

Respondent:
Pet Brands Ltd

Heard at: Leeds

On: Wednesday 18 December 2019

Before: Employment Judge R S Drake

Representation

Claimant: In Person

Respondent: Mr Stephen Thompson (General Manager)

JUDGMENT

- 1 The Claimant's complaint of breach of contract succeeds. He is awarded and the Respondents shall pay to him the net sum (account having already been taken of Tax and NI) of £12,566.14.
- 2 The Claimants complaint of withholding holiday pay entitlement for a notice period of three months succeeds. He is awarded and the Respondents shall pay to him the net sum (account having already been taken of Tax and NI) of £1,050.
- 3 I exercise my power under Rule 62 to set out reasons in full as below.

REASONS

Introduction

1. First, I record my gratitude to the parties for efficient and effective presentation of their respective cases, helpful and co-operative advocacy, and also very helpful preparation of the presentation of documentary evidence and the presentation of final oral Submissions. I heard oral evidence from the Claimant himself and the Respondent's General Manager Mr. Stephen Thompson, but not their owner/directors who had attended certain meetings at which key events occurred. Therefore in respect of those meetings, their dates and what happened at them, I had only the direct testimony of the Claimant and his documents on the one hand, and the indirect hearsay evidence of the owners as reported by Mr Thompson, which he tried to give to the best of his ability.

Issues

- 2 I determine that the issues to be examined (though some were more or less relevant than others as will become apparent) were agreed as follows: -

Wrongful Dismissal/Breach of contract/Holiday Entitlement

- 2.1 What was the Claimant's entitlement to notice, including any provision for payment in lieu?
- 2.2 What words or actions were used or committed by the parties at a meeting which took place 29 April 2019 or later?
- 2.3 Was the Claimant dismissed or did he resign at any time?
- 2.4 Was the Claimant dismissed without notice and if so when?
- 2.5 Did the Claimant agree to waive any entitlement to work his notice period and be paid in lieu of notice instead?
- 2.6 What was the Claimant's entitlement in respect of holiday during his notice entitlement period and how is pay for that entitlement valued?

3 Remedy

3.1 If the Tribunal were satisfied that the Claimant is entitled to three months' notice how is pay and benefits in lieu to be calculated?

3.2 The standard of proof required is the usual civil law standard and thus that of a balance of probabilities.

The Facts and Reasons for the findings thereof

4 I made the following findings of fact based upon evidence that it heard both orally and by reference to bundles of documents produced by both parties. Each was thoroughly cross examined. I also considered not only the written statements of the above-mentioned witnesses, but also, when attention was drawn to them, the contents of a documents bundle comprising over 75 pages. Lastly, time was allowed at the conclusion of oral testimony to enable both sides to give final oral Submissions which were also considered in detail.

5 Using abbreviations of "C" and "R" for Claimant and Respondent respectively and referring to witnesses and documents in bold type page numbers in the Evidence Bundle or paragraphs in witness statements, the findings of fact relevant to the Tribunal's decision are as follows: -

5.1 C was employed by R from 22 October 2018 as a Commercial Director on the basis of a written contract signed by him which appears at **C7** to **C22**.

5.2 R are a company which trades in pet foods and is part of larger group employing upto 25 people and is owned by two brothers Messrs Sharma. On a day to day basis Mr. Thompson was General Manager but all relevant discussions about the Claimant's probationary period were undertaken by the owner brothers on either 29 April or 21 May 2019. Mr Thompson undertook a meeting with C on 21 June 2019.

5.3 The contract contains the following provisions (see **CP9** and **CP14**)

"Para 2.2 – The first six months of your Employment shall be probationary ... your employment may be terminated at any time during the first month without notice ... after one month and during your probationary period your employment may be terminated at any time on one week's notice ... we may at our discretion extend this period for upto a further three months".

“Para 13.1 – After successful completion of your probationary period detailed within this employment contract either of us can terminate employment by giving three months’ notice in writing ...”

5.4 There are conflicts of evidence on what happened at certain meetings. R say that a probation review meeting was planned before the expiry of the first six months of the contract, but the written evidence points to the earliest date for such a meeting having been 29 April and thus after the expiry of the probationary period. R says that the meeting did take place on 29 April and that they expressed concern about C’s performance and that he said he resigned. C says that he received no call to a meeting on 29 April, but did attend a meeting 21 May and that he did say that “if they (R) were not sure about me, then I would be happy to resign” but not that he was at that time unconditionally resigning.

5.5 I do not have any direct testimony from R’s owners who were present at that meeting whenever it was held, but I do have unequivocal testimony from C whose oral testimony is backed by consistent subsequent written protestations that he hadn’t expressly and clearly resigned in an unconditional way. I therefore prefer the testimony of C in this respect and that the meeting took place on 21 May 2019 and not 29 April, but that in any event if it had, then even then that date was after expiry of the probationary period.

5.6 At the meeting between C and Mr Thompson on 21 June 2019, the latter said he thought or had been told C had resigned and told him to return company property, but C protested that he hadn’t resigned though he yielded to Mr Thompson’s request under protest. C says his employment ended at this time and he wasn’t given notice and I find he was not given any notice at that time, but that Mr Thompson took him to be entitled only to notice as if on probation because he had been advised by the owners that probation was the continued or renewed status of C.

Conclusions on Application of Law to Facts

6 I find that C has shown that his contract provides for a probationary period limited to 6 months from commencement of employment, and that such period therefore expired 22 April 2019 and wasn’t renewed before expiry. This analysis requires no detailed consideration of law, save to apply the ordinary canons of construction to interpreting the contract’s terms as detailed above.

7 The reference to the discretion to extend the probationary period can only make sense if discretion is exercised before expiry, because to extend after expiry would require use of different words such as “renewal” or “fresh start” and not “extend”. By definition, something can only be extended if done so before expiry, otherwise damage is done to the logic of the words used.

- 8 In this case, though discretion is reserved to extend, on application of the words in the contract, such extension is only legally valid if undertaken before expiry of the initial period or any period commenced before its expiry. Further, any other post expiry change to the probationary period would thus amount to a change to the contract, which at common law can only legally be effected if done in the same contractual way as the original written contract, and thus in writing and signed by both parties. No such variation exists on the evidence in this contract.
- 9 Therefore, paragraph 13.1 applies and either party is to give three months' notice if either seeks to terminate. I do not find C expressed an unconditional express present as opposed to possible future resignation as alleged by R, but merely stated a conditional possibility dependent on R telling him they weren't satisfied with his performance, and him then going further by expressly resigning. He did not do so. Instead, his employment terminated on him being told to return company property, a requirement consistent only with R's intention to regards the employment as at an end.
- 10 In the absence of evidence from the owners, I have only the evidence of C as to his holiday entitlement not taken and not paid for, so I find in his favour in this respect as detailed and calculated below.
- 11 I calculate C's entitlements as follows after taking account of the common law principles that the C is only entitled to be put in the position he would have been if the contract had been properly fulfilled and this after taking account of what tax and NI would have been deductible if applicable: -

<u>Item</u>	<u>£</u>
3 months net pay	10,500.00
3 months net car allowance	875.00
3 months employers pension contributions	900.00
3 months net medical insurance	126.00
Unpaid expenses	165.14
6 days net holiday pay	<u>1,050.00</u>
Total	13,616.14

Employment Judge R S Drake

Date: 24 December 2019