EMPLOYMENT TRIBUNALS
CVP HEARING

Claimant: Mrs M Ferris

Respondent: Generator Power Limited

HELD AT: **Sheffield** **ON: 23 July 2020**

BEFORE: Employment Judge Little

REPRESENTATION:

Claimant: Miss J Wilson-Theaker of Counsel (instructed by Bhayani HR and Employment Law)

Respondent: Ms Widdett of Counsel (instructed by Blacks Solicitors LLP)

JUDGMENT having been sent to the parties on 31 July 2020 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

1. These reasons are requested by the respondent's solicitors in their email of 11 August 2020.
2. **The complaints**

   In a claim form presented to the Tribunal on 5 November 2019 Mrs Ferris complained that she had been unfairly and wrongfully dismissed.

3. **The issues**

The essential issue in this case is whether the claimant was dismissed in circumstances where she resigned giving a notice period which was subsequently curtailed by the respondent.

The parties had agreed a statement of issues. Those issues, in a slightly different format than the statement of issues, are as follows:

3.1. Contractually, what notice period was the claimant to give the respondent if she was resigning her employment?

3.2. In particular was the claimant prohibited from giving more than four weeks' notice or was it permissible for her to give a period of three months' notice as she purported to?

3.3. Did the respondent have a contractual right to curtail the notice period actually given by the claimant?

3.4. Did the respondent's curtailment of the notice given by the claimant amount to a dismissal?

3.5. If so, can the respondent show a potentially fair reason for that dismissal - being either capability or some other substantial reason?

3.6. If so was that actually a fair reason having regard to the test set out in the Employment Rights Act 1996 section 98(4).

3.7. If the claimant was unfairly dismissed did she contribute to that dismissal and if so to what extent?

4. **Evidence**

The claimant has given evidence. The respondent's evidence was given by Mr S Cardwell, owner and managing director of the respondent, Mr S Ferguson, sales director and Ms M Whitehouse, office manager

5. **Documents**

I have had before me an agreed bundle of documents running to 85 pages.

6. **The facts**

6.1. The claimant's employment with the respondent commenced on 2 February 2015. The job title was General Manager of the respondent's Trackway Solutions Division.

6.2. Prior to the commencement of the employment the claimant had received an offer letter from the respondent and that was dated 14 January 2015. A copy appears in the bundle at pages 34 to 36. The claimant was never issued with a formal contract of employment, although the 14 January 2015 letter states that it is setting out the main terms and conditions of employment. The employment was subject to a six month probationary period.

6.3. On the last page of the offer letter (page 36 in the bundle) appears the following:

"*Notice*

During your probationary period either party may terminate this employment giving one weeks' notice in writing. Thereafter either party may terminate this employment giving four weeks' notice in writing. Where you are found to have committed an act of gross misconduct you will be dismissed without notice."

6.4. The respondent says that in the months leading up to the claimant writing and delivering her letter of resignation the respondent had serious concerns about the commercial performance of the Trackway division and, in Mr Ferguson's words, by extension, the claimant's own performance. At a monthly management meeting towards the end of July 2019 Mr Ferguson, who was the claimant's line manager, made the claimant aware that there were serious concerns about Trackway's performance and explained that this would need to be rectified by costs being cut which was likely to include redundancies. It would have been the claimant's task to be involved in decision making and the execution of plans concerning this strategy.

6.5. Whilst naturally, as general manager of Trackway Solutions the claimant was aware that that division was underperforming I find that the claimant was not informed that the respondent had any concerns about her own individual performance. Accordingly there was at this stage no suggestion of any performance management steps being taken in relation to the claimant.

6.6. Mr Ferguson made arrangements to meet with the claimant on 2 August 2019 so that the cost cutting issues could be discussed further.

6.7. In the event, at the beginning of that meeting the claimant gave Mr Ferguson a letter of resignation. That letter, which is dated 2 August 2019 (page 37) comprised the following:-

"*Dear Simon*

Re: Resignation.

Please be advised that I wish to tender my resignation from the company. I herewith give three months' notice of my intention to leave, my last working day to be Thursday 31 October.

Yours faithfully

Maria Ferris"

The claimant explained to Mr Ferguson that the reason for her resignation was that she was concerned about her health and wanted to obtain different employment that would afford a better life/work balance. The claimant's evidence to me was that the reason she felt that a three month notice was fair and reasonable was because she had a good relationship with the respondent, was in a senior position and did not, as she put it, want to leave them in the lurch. She wanted to complete the financial year to help the respondent although she would also have time to seek a new role. She believed that the respondent would appreciate that notice period so that they could find a replacement for her.

6.8. On 5 August 2019 Mr Ferguson informed the claimant that her resignation had been accepted and that she should continue to work as normal.

6.9. On 12 August 2019 Mr Cardwell, the respondent's managing director, invited the claimant to a meeting with him. Notes of that meeting were taken by a Ms Miles of HR and a copy appears at page 40a in the bundle. The meeting was brief. According to the note, Mr Cardwell referred to Mr Ferguson as having accepted the claimant's notice as being four weeks (although it appears that Mr Ferguson had not referred to acceptance on the basis that the notice had been, at that stage, reduced to four weeks). Mr Cardwell went on to indicate that the claimant was being put on garden leave and that her employment would end on 30 August 2019. Mr Cardwell's evidence to me (see paragraph 15 of his witness statement) was that he believed the claimant's motive for giving three months' notice was "purely seeking to provide herself with income whilst she found another job and would hopefully be sent home from work on pay". During the meeting Mr Cardwell gave the claimant his letter of 12 August 2019 and a copy appears on page 38 of the bundle. That letter includes the following:

"*Having checked your contract of employment, and your notice period is four weeks (sic). Therefore, your last day of employment will be Friday 30 August 2019.*

You will not be required to work this notice period and you will, in effect, be on 'Garden Leave'".

6.10. Subsequently there was an exchange of emails between the claimant and Ms Miles. The claimant indicated that she intended to challenge the suggestion that her offer of three months' notice had not been made in good faith. Ms Miles referred the claimant to the offer letter which, she said "states four weeks' notice". The claimant replied to this contending that the offer letter was not a contract of employment and in any event it did not place any restriction on the claimant as to what notice she should give. She believed that four weeks was the minimum and that reducing the notice she had actually given amounted to being sacked. The claimant had taken advice from a CAB. The claimant then reiterated these concerns in an email of 14 August 2019 to Mr Cardwell.

6.11. On 16 August 2019 Mr Cardwell replied to the claimant (page 45). He stated that for the avoidance of doubt, the claimant did not have a three month notice period as she claimed. The offer letter provided that the employment was subject to a notice period of four weeks. He stated that the claimant could not impose a unilateral variation of the notice period. The letter went on to 'clarify', in fact alter, references which had been made in the 12 August letter to the imposition of post-termination restrictions.

7. **The parties' closing submissions**

7.1. <u>Claimant's submissions</u>

Ms Wilson-Theaker had prepared written submissions and also addressed me orally. In the written submissions it was stated that the claimant's position was that she had never been provided with a written contract of employment. However counsel accepted that the offer letter dated 14 January 2015 might stand as a valid statement of terms and particulars of employment, although not fully complying with the Employment Rights Act 1996 section 1.

On the crucial issue of whether the claimant had been entitled to give and serve three months' notice, Ms Wilson-Theaker referred me to a passage in the IDS Employment Law handbook – 'Contracts of Employment' (page 709 of that work). That is part of the chapter which deals with termination by resignation, agreement or performance. Commenting on the position on resignation, the learned editor of the handbook states as follows:

"*Whatever the period of notice required (*that is by contract or the statutory minimum*), a resignation that specifies a termination date beyond the expiry of that period will still be valid."*

In support of that proposition the handbook refers to the unreported case of **Beadnell v James Howden and Co Limited** ET Case No 71141/95. In that case Mr Beadnell had given notice indicating that he would like to leave the employment as soon as possible after 22 December 1994. However the employer stated that he was only required to give four weeks' notice with the result that his employment would terminate on 13 December. The handbook reports that the Tribunal's decision was that by bringing the date forward the employer had dismissed Mr Beadnell and that dismissal was unfair.

In the claimant's case there was no express written provision within the offer letter whereby the respondent could curtail a period of notice given by the employee.

If the claimant was found to have been dismissed, there was a complete absence of any documentary evidence which would tend to show that the claimant had been underperforming in her role. She had not been given warnings or any opportunity to improve. In any event there had been no fair procedure prior to the claimant's alleged dismissal.

In her oral submissions Ms Wilson-Theaker said that the reference to a four week notice period in the offer letter had to be construed as a minimum period and it did not prevent the claimant from giving and serving a longer period.

I was also referred to the case of **Harris and Russell Limited v Slingsby** [1973] ICR 454. It appears however that this authority does not really assist me in determining the present case. It says that once notice to terminate employment has been given by either employer or employee, the giver of that notice cannot unilaterally withdraw it. It seems to me from the relatively brief report that on the facts of that case it was not disputed that the employer had chosen to dismiss during a notice period given by the employee. The issue was whether the employee seeking alternative employment and going for an interview during the notice period amounted to a dismissible offence.

In terms of the fairness of any dismissal found, Ms Wilson-Theaker contended that although Mr Cardwell may have assumed that the claimant would have been demotivated during the three month notice period, there was no substance to that belief. The respondent could not contend that there had been an irretrievable breakdown in the employment relationship.

7.2. <u>Respondent's submissions</u>

Miss Widdett said that the case had to be approached as a contractual one. The offer letter did not say that the notice period had to be at least four weeks. It was not open to the claimant to unilaterally vary her contract of employment. The respondent needed no more than four weeks.

I was urged to consider the case of **Beadnell** with caution. It was a first instance decision and there was no transcript available.

The claimant had not on its issue, or subsequently, disputed the terms set out in the offer letter. The claimant's division was significantly underperforming. The claimant did not bring any restructure plan to the 2 August meeting. The claimant was not assisting the respondent by requiring to be paid for a three month notice period. The claimant had been unprepared to deal with the difficulties which the Trackway Solutions division was encountering. The notice period was four weeks. If the notice period had to be assessed as a reasonable period then three months would not be reasonable.

If a dismissal was found, Miss Widdett explained that the respondent was not saying that the claimant had been dismissed for capability but rather for some other substantial reason. That was the claimant not engaging with her responsibilities for a failing part of the business and she had not provided any proposals for cost cutting.

8. **My conclusions**

8.1. The status and effect of the 14 January 2015 offer letter.

I find that whilst that document does not meet all of the strict requirements for a statement of initial employment particulars as required by the Employment Rights Act 1996 section 1, it nevertheless does define and record the agreement between the parties as to the terms on which the claimant was to be employed.

8.2. What is the effect and meaning of those terms in so far as notice to terminate the employment is concerned?

The relevant part of the notice provision (page 36 of the bundle) is:

"*… Either party may terminate this employment giving four weeks' notice in writing".*

I construe that term as meaning that the four week notice period is the minimum which either party can give the other. I reach that conclusion on the basis that the offer letter does not prohibit either party giving more than four weeks' notice and on the basis of the legal principles which I understand to apply. It is also to be noted that the provision is inaccurate. If the claimant had been employed for more than four years, the respondent would have been obliged to give the statutory minimum notice which would have been incrementally more than four weeks.

8.3. The relevant legal principles

As both counsel before me have acknowledged, authority on the point which is in question in this case is scant. As I have noted, in the passage from the IDS Employment Law handbook to which I have been referred the editors make the unequivocal statement that "Whatever the period of notice required, a resignation that specifies a termination date beyond the expiry

of that period will still be valid". Whilst the handbook goes on to refer to the **Beadnell** case as "an example" no other examples are given and **Beadnell** is a first instance decision. The only other case which counsel have referred me to is Miss Wilson-Theaker's authority, **Harris Russell Limited v Slingsby**. However by reason of the comments that I have made when recording her submissions on that case I do not consider it to be on point.

When the handbook refers to "the period of notice required" I understand it to mean that 'required' translates as the minimum.

In these circumstances I venture to set out what I consider to be the applicable legal principles with particular reference to the facts as found in this case:-

(i) I find that in the case before me the reference to a four week notice period means a minimum period and not a maximum period.

(ii) The respondent could, in contractual documentation or the offer letter, have stipulated that four weeks was the *only* notice period which could have been given, but it failed to do so.

(iii) At the point of an employee deciding to end their own employment, that employee can be regarded as "in charge" of the process and so can stipulate a notice period which is longer than the statutory or contractual minimum, as long as it is a reasonable notice period.

(iv) In the circumstances of the claimant's case I find that a three month notice period was reasonable. The claimant had a relatively senior position, reporting directly to a director and had immediate responsibility for a whole division of the respondent's business. I find that the respondent has sought to play down the claimant's seniority or importance to the business which contradicts its evidence that she would have had a significant role in reaching what are described as tough decisions with regard to cost cutting and redundancies within her department or division. Viewed in this context, a three month notice period can, taking judicial notice, be regarded as not unusual.

(v) The employer may, rightly or wrongly, conclude that the notice actually offered by its employee does not suit the respondent and its business.

(vi) In those circumstances the employer should seek to discuss the length of notice given with the employee to see if a shorter period can be mutually agreed.

(vii) If it cannot, the employer can take matters under it's control and decide that the employment will end sooner than the employee has proposed. If it does so however, in my judgment, that will mean that it is the employer who is terminating the employment rather than the employee.

Applying those principles to the case before me I find that whilst the respondent was entitled to take the view that it did not need the claimant to work the notice period she had offered, its approach and its decision to

write to her in terms of the 12 August 2019 letter means that there was a dismissal.

8.4. Can the respondent show a potentially fair reason for that dismissal?

In the grounds of resistance, (paragraph 19) the respondent contends that if a dismissal is found the reason for it was some other substantial reason. That was that the respondent had legitimate concerns regarding the claimant's performance and capability prior to her tendering her resignation and those concerns became greater after the claimant purported to resign on notice longer than the contractual requirement "whilst expressing a desire to be sent home on full pay for this extended period". The grounds continue that the respondent viewed that behaviour as being detrimental to the future of the Trackway division and severely damaged the respondent's trust in the claimant. There was therefore the respondent contends a fundamental and irretrievable breakdown in working relations and so ongoing employment was untenable. It is to be noted that in her closing submissions, Ms Widdett expressed the breach/SOSR in slightly different terms.

I accept that the other substantial reason as pleaded *could* amount to a substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held.

8.5. Was that reason actually fair?

In my judgment it was not. In so far as the claimant's performance and capability prior to tendering her resignation is concerned, it is clear that even if the respondent had concerns, it had taken no steps to bring those concerns to the claimant's attention. She was not warned; she was not put into a performance review programme; she was not given any opportunity to address any perceived shortcomings in her performance.

As I have found that the claimant was entitled to give the notice which she did give that cannot properly be regarded as a fundamental breach.

The allegation that the claimant had expressed a desire to be sent home on full pay for the three month period appears to be Mr Cardwell's theory, although the respondent had adduced evidence from Ms Whitehouse who says that on 12 August 2019 she heard the claimant tell members of the accounts team that she was hoping to be put on garden leave. The context for what Ms Whitehouse says she overheard was that the claimant was waiting in the accounts office to be called into her meeting with Mr Cardwell on 12 August 2019. The claimant's evidence is that she did not recall having this conversation and would she believes have been unlikely to have disclosed such information to the accounts team who the claimant describes as being the company gossips. The claimant conceded that at most she may have said that she thought she might be put on garden leave if a replacement was found for her but did not say that she was hoping that that would be the case.

During cross-examination Ms Whitehouse accepted that she might have been on the telephone whilst the claimant was in the accounts office on 12 August but said that she believed that she had simply been on hold. It was pointed out that there was no reference to being on hold in her witness

statement. She denied that any background noise within the accounts office might have affected what she could hear of any conversation the claimant might have been having with somebody else.

Whilst the evidence about what was or was not said about garden leave is not particularly clear, what is beyond doubt is that Mr Cardwell had prepared the letter of 12 August 2019, on my finding in effect a dismissal letter, prior to the meeting and there is no evidence that Ms Whitehouse reported what she had allegedly overheard to Mr Cardwell before that letter was handed to the claimant. Accordingly whilst this is a matter that I need to deal with in terms of the contribution issue, it cannot support the fairness of the dismissal.

8.6. Did the claimant contribute to her unfair dismissal?

Having regard to my findings in respect of the fairness of the dismissal the only matter I need to return to is the suggestion that the claimant was angling to get a lengthy period of garden leave. The evidence on this point remains unsatisfactory but the reality is that the claimant's conduct was resigning with a three month notice period. It is difficult to describe the chance that that might have resulted in a lengthy period of garden leave as being conduct of the claimant. Whether or not the claimant went on garden leave was a decision for the employer. Accordingly even if the claimant had this hope or expectation, it is not in my judgment correct to regard that as being contributory conduct.

The claimant has also pointed out that she had in the past received significant bonuses; had recently won a large contract for the respondent; her duties had recently been extended to cover responsibility for social media and that no issues had been raised about her management of two sales people nor their performance.

I have also been asked to consider whether there should be a limit on the compensation to be awarded to the claimant on the just and equitable principle the suggestion being that there was a chance that the claimant would have been dismissed in due course on capability grounds. Here I accept Ms Wilson-Theaker's point that any such process for a senior employee would have taken considerably longer than the period of loss which the claimant seeks – which is the difference between the notice the respondent gave her and the notice period she had originally given to the respondent. It is also very difficult to make this type of speculative judgment in a case where no process had begun. That makes an assessment or prediction as to whether or not the claimant might subsequently have been dismissed a very difficult one, but in the circumstances for the reasons set out above, also an academic one.

9. **The remedy awarded to the claimant**

There was no dispute with regard to the basic award sought by the claimant save that Ms Widdett invited me to reconsider the contribution question, now in the context of the Employment Rights Act 1996 section 122(2). However I remain of the view that there was no relevant conduct.

The claimant was no longer seeking any compensation for loss of statutory rights. She did seek the loss of her company car for the balance (eight weeks) of the

notice period she had given. I declined to make any award under that head because there was no evidence before me of the value of the car.

I considered that it was appropriate to award employer's pension contributions of the eight week period.

I also considered that it was appropriate and just and equitable to make an award under the provisions of the Employment Act 2002, section 38. That was in circumstances where a lower award was appropriate because the 2015 offer letter met some, but not all, the requirements of the relevant provisions of the Employment Rights Act 1996 – sections 1 and 3. Specifically there was no note about disciplinary procedures and having regard to the importance of such procedures that was a significant omission which sounded in an award being made.

Employment Judge Little

Date 26th August 2020