



# EMPLOYMENT TRIBUNALS

***Claimant***

***Respondent***

Mr P Bartram

**AND**

Ardmore Construction Limited

**Full Merits Hearing** heard by CVP    **On:**    13 August 2020

**Before:**    Employment Judge Nicolle sitting at London Central

**Representation**

**For the Claimant:**    Mr A Barnes, Solicitor

**For the Respondent:**    Mr S Mac Labhrai, in-house representative.

## JUDGMENT

1. The Tribunal finds that that the Respondent was entitled to terminate the Claimant's employment on the giving of one week's notice and not 12 weeks as contended by the Claimant.
2. The Claimant's claim for breach of contract and/or an unauthorised deduction from wages therefore fails and is accordingly dismissed.

## REASONS

The Hearing

3. I heard evidence from the Claimant and Mr Pearce Byrne, a Director of the Respondent. I was provided with a bundle of documents in advance of the hearing comprising 133 pages. I gave judgement orally at the conclusion of the hearing, but written reasons were requested on behalf of the Claimant.

The Claim

4. The claim involves a discreet issue as to the Claimant's applicable notice period. He was paid in lieu of one week's notice. The Claimant says he should have received 12 weeks, and therefore the claim is for the deficit of 11 weeks' pay. His argument being that he had completed the three-month probationary period in his contract of employment.
5. The Claimant brought a claim pursuant to a Claim Form issued on 9 April 2020. He was employed by the Respondent as Communication and Marketing Manager. His employment commenced on 27 August 2019 and he said it was terminated on 2 December 2019 albeit there is an element of dispute as to exactly when that termination took effect. I find that his employment was terminated on 29 November 2019.

## **The Contractual Documentation**

### Offer Letter

6. The Claimant received an offer letter dated 9 August 2019. This letter provides that the first three months of his employment would be a probationary period. It says that if during the probationary period either you or the company feels that the employment is not working out than either party can terminate this arrangement by giving one week's notice.

### Contract of Employment

7. The Claimant was subject to a contract of employment dated 9 August 2019 (the "Contract"). The Contract was signed on behalf of the Respondent but the version I have seen in the bundle at page 52 was not signed by the Claimant but no point was taken on this during the hearing and therefore I have dealt with this solely as an issue of contractual interpretation. Relevant provisions within the Contract are:
  - clause 6.1 the Claimant would receive a basic salary of £63,000 per annum;
  - clause 13 deals with the probationary period. It repeats the position set out in the offer letter that the first three months of his employment would be a probationary period. It goes on to state: "You will be informed in writing of your successful completion of the probationary period".
  - clause 13.2 provides that the probationary period can be extended by a further three months at the Company's discretion in which case the notice period referred to in Clause 13.1 above will continue to apply; and

- clause 14.1 provides that after successful completion of your probationary period the prior written notice required from you or the Company to terminate your employment will be twelve weeks unless otherwise mutually agreed in writing.

### Employee Handbook

8. The Respondent has an Employee Handbook. There is reference to notice periods. This includes the statement that after successful completion of your probationary period the prior written notice required from or the Company to terminate your employment will be four weeks unless otherwise mutually agreed in writing.

### Probation Review Policy

9. The Respondent also has a probation review policy (the “Policy”). This is relatively unusual in the level of detail provided. It is sufficient to refer to the principal potentially relevant provisions within the Policy. It is not clear whether the Policy was intended to be contractual and my finding is that it would be regarded as a guidance note to be read in conjunction with the probationary period in the contract of employment.
10. Clause 8 provides that that at least one informal review should be carried out during the employee’s probationary period. It is accepted that no formal review was undertaken. Clause 9 provides that during an employee’s probation the Line Manager should provide regular feedback to the employee about his performance and progress should there be any problem areas, raise these with the employee as soon as possible with a view to resolving them. Clause 11 provides that one month prior to the employee’s end of probation date the HR Department will send a reminder email together with a probation review form. It goes on to provide that towards the end of the probationary period, using the probationary review form, the Line Manager should conduct a final review of the employee’s performance and suitability for the job and then if the employee’s performance has not met the standards required by the Company the Line Manager should discuss the matter with the HR Department before any decision is made to terminate the employee’s employment. The HR Department will then confirm the termination in writing to the employee. If no probationary review meeting is held and/or if the HR Department is not notified of the outcome of such a meeting within one week of the end of the probation date then it would be assumed that the employee has successfully completed the probation and a confirmation will be sent. It goes on to state where a decision is taken to terminate the employee’s employment the employee must be interviewed and informed of the reason for the termination. There will be no right of appeal.
11. The bundle at page 117 also included a flow chart setting out the probationary review process, albeit this was not a document I was referred to during the hearing.

Chronology of Events

12. The Claimant says that he did not have any perception that there were any issues during the first three months of his employment. It was not until an email of 19 November 2019 from Amy Wallace, HR assistant to Mr Byrne that a formal process for the review of the probationary period commenced. Ms Wallace notified Mr Byrne that the Claimant's probationary period would be ending on 27 November 2019. It set out the options namely passed probation, probation extended, employee has not passed probation. It attached a copy of the probationary review process and end of probation review form.
13. Mr Byrne was on annual leave in New York between 19-25 November 2019. He says that prior to that time whilst there had been no formal feedback performance review meetings with the Claimant that he had had regular dialogue with him regarding objectives and day to day business matters. He says that on 25 November 2019 he compiled handwritten notes setting out his concerns regarding the Claimant's performance. He then typed these notes up on 27 November.
14. Mr Byrne sought to arrange an in-person meeting with the Claimant on 27 November 2019, but he was surprised that the Claimant was not at his desk and there was no obvious explanation as to his whereabouts. The Claimant says that he was working from home that day. There is a dispute between the parties regarding flexible working, the Claimant's position being that he took two or three home working days and otherwise would be frequently at client premises.
15. What then happened is that an email was sent by Mr Byrne on 27 November to the Claimant and it was agreed, at the Claimant's instigation, that of various possible dates for the meeting it should take place on 29 November 2019. Prior to that meeting on 27 November, Mr Byrne on his own evidence in response to possible irritation that the Claimant was not at his desk, had requested from HR a print out of the time log for the duration of the Claimant's employment. He did say though that that was not a material factor in his decision that the Claimant had not passed the probationary view period, so this is not a material consideration.
16. The meeting took place on 29 November. The Claimant gave evidence that he considered that it constituted an "assassination". He says that he was totally taken aback to be advised that there were serious concerns, his position being that he had no prior notice of such concerns.
17. I was referred to and end up probation review document. In that document which was completed on 29 November, albeit that is a manuscript amendment and it appears to have been originally typed on 27 November. Mr Byrne listed both major and minor concerns regarding the Claimant's performance. Some of these referred to a pre-employment

commencement email dated 21 August 2019 from Mr Byrne to the Claimant setting out various objectives. It is not necessary for me to set out the performance concerns as it is outside the scope of my decision as to whether the Claimant was or was not performing. It is simply a case of contractual interpretation. At pages 57-59 of the bundle there was a longer document setting out what Mr Byrne perceived to be shortcomings in the Claimant's performance.

18. There was an exchange of emails on 29 November between the Claimant and Mr Byrne where The Claimant sought a further opportunity to deliver on his role. Mr Byrne responded by saying that he had made his decision and there was no further discussion to be had. The Claimant was then sent a letter by Ms Wallace in HR on 2 December 2019 confirming that subsequent to the meeting on 29 November 2019 he had not successfully completed his probationary period and his last working day was therefore 29 November 2019 and he was paid one week in lieu of his notice.

### The Law

19. Mr Mac Labhrai argued that there should be a qualitative rather than purely quantitative interpretation of the probationary period within the contract of employment. He placed considerable emphasis on the word "successful" and there needing to have been a successful completion of the probationary period. He says particular significance exists on this not just in terms of the extension of the notice period but also it being a trigger for a raft of employment related benefits to include sick pay, enhanced pension contributions, eligibility for life assurance and private medical.
20. He referred to well-known and established case law principles regarding contractual interpretation. It should be said these cases are of generic significance rather than employment specific in particular the very well-known Judgment of Lord Hoffman in the Investors Compensation Scheme v West Bromwich Building Society (No. 1) 1998 1WLR 896, HL in which he emphasised that a contract should be interpreted not according to the subjective view of either party but in line with the meaning it would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of contract.
21. He also referred to Arnold v Britain and others 2015 AC 1619, SC in which Lord Neuberger summarised the general principles that apply to the interpretation of express contractual terms. When interpreting a written contract the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. He went on to say that the meaning must be assessed in the light of:

- the actual ordinary meaning of the clause;

- any other relevant provisions of the contractual agreement;
- the overall purpose of the clause and the agreement;
- the facts and circumstances known or assumed by the parties at the time the document was executed; and
- commercial common sense.

He said that subjective evidence of any parties' intentions should be disregarded.

22. He also referred me to the judgment of the Supreme Court in Wood v Capita 2017 UKSC 24 which held that a court's task is to ascertain the objective meaning of the language used in the contract. The court must consider the contract as a whole and depending on its nature, formality and quality of drafting give more or less weight to elements of the wider context. Where there are rival meanings the court can reach a view as to which construction is more consistent with business common sense.
23. Mr Barnes argued that the Respondent had not followed its own probationary policy. There had been a failure to carry out regular reviews and there had been a failure to provide written formal feedback. He referred to various case law authority including White v London Transport Executive 1981 IRLR 261, Post Office v Magull and Przybylska v Modus Telecom Limited UKEAT/0566/06/CEA. These cases all in effect involve employment tribunals finding that an implied term exists on employers not to act unreasonably in terms of the probationary period.
24. In Przybylska v Modus Telecom Limited the EAT held that an express contractual right to extend an employee's probationary period was sufficient to ensure the business efficacy of the employee's contract. But the tribunal had erred in law by implying a further contractual term to the effect that the probationary period would be extended for a reasonable time to allow the employer to provide some indication by word or deed as to whether it had been successfully completed.
25. I considered all the above cases during an adjournment after submissions.

### Conclusions

26. I find that the Respondent was entitled to terminate the Claimant's employment on one week's notice. Whilst I acknowledge, and Mr Byrne accepted, that some elements of the probationary review policy had not been followed, I have found that the probationary review policy is not in itself of contractual effect. I therefore do not consider that a failure to provide more reviews or feedback during the course of the probationary period were in themselves contractual breaches rendering the termination

at the end, or shortly after the end of that probationary period, one which was outside the contractual scope of the contract of employment.

27. I do consider it relevant that the Claimant in response to a question from me acknowledged that he placed considerable reliance on the fact that there had been what he saw as a two day delay from 27 to 29 November 2019 in notifying him that his probationary period had been unsuccessful. It is relevant that that delay only took place as a result of the Claimant's absence from the office on 27 November and failure to respond to Mr Byrne's email until 9pm that day and then his election of the 29th rather than the 28th for that review meeting.
28. If the Claimant's position that any extension of notification of the end of the probationary period were to be accepted it would render the ability to terminate on one week's notice subject to some bizarre circumstances, for example, an employee on holiday or off ill, or indeed deliberately seeking to avoid a probationary review meeting, could have the effect of extending the notice period because they are able to say it had not been done within that three month period. Equally that delay could have resulted from the absence of the relevant line manager and in this context, it is relevant that there may have been some delay because of Mr Byrne's annual leave in New York.
29. I accept the argument made by Mr Mac Labhrai that the natural and objective interpretation of clause 13.1 is that there should have been a successful completion of the probationary period of which the employee is informed. It is self evident that at no point was the Claimant informed in writing that he had successfully completed the probationary period.
30. It is not my role in the context of the claim to assess whether Mr Byrne was right in his assessment that the Claimant had not fulfilled the Respondent's expectations it is simply my role to assess whether on the terms of the Contract they were entitled to terminate his employment on the basis of one week's notice and I find that they were so entitled. Therefore, whilst the process may not have been 100% in accordance with the terms of the probationary review policy I am satisfied on an objective interpretation of clause 13 of the contract of employment and the offer letter that the Respondent was entitled to terminate on a week's notice.
31. It does not automatically follow that there was any contractual right for there to be an extended probationary period, and even if it had been extended, which is entirely at the Respondent's discretion, it would have remained the case that the notice period would have still been one week during that extension. Mr Byrne's evidence was that he simply did not consider there was any realistic prospect of the Claimant performing to a satisfactory standard and therefore there was no benefit by an extension. He had made up his mind and he communicated that to the Claimant and the Claimant therefore was not informed that he had successfully completed the probationary period.

32. Given my finding that there was no uncertainty or ambiguity in the relevant contractual provisions regarding the probationary period I do not find it necessary to imply a term regarding the basis upon which notice would be given during, or at the end, of that probationary period.

33. Finally, Mr Barnes argued that in circumstances of contractual inconsistency or ambiguity the contra proferentem principle should apply, and interpretation should be given in favour of the employee. Having reviewed the relevant contractual principles and applied the applicable case law, in particular the guidance from Lord Hoffman in West Bromwich and the decision of the Supreme Court in Capita I find that there is no uncertainty in the terms which are clear and the Respondent was entitled to act as it did and therefore the Claimant's claim for an additional eleven weeks' pay in lieu of notice fails and is dismissed.

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**Employment Judge Nicolle**

Dated: ... **2 September 2020**

Judgment and Reasons sent to the parties on:

02/09/2020

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For the Tribunal Office