



EMPLOYMENT TRIBUNALS (ENGLAND & WALES)
LONDON CENTRAL

BETWEEN

Mr E Cole	Claimant
Union (Soho) Ltd	Respondent
Employment Judge:	Mr J S Burns
<u>Representation</u>	
Claimant:	in person
Respondent	Mr K McNerney (Counsel)

Held on CVP on 11/9/2020

JUDGMENT

The Respondent must pay the Claimant £3507.50 by 18/9/2020

Reasons

1. The issue was whether the Claimant was entitled to be paid damages for the Respondent's failure to pay him his contractual notice pay. The Claimant said he was entitled to 8 weeks notice and the Respondent said he was entitled to one month's notice only, (which he had been paid).
2. I heard evidence on oath subject to cross-examination from the Claimant and then from the Respondent's two witnesses Mr T Cookson and Mr P Cross. I was referred to various documents in the Respondent's and Claimant's bundles.
3. The Claimant was clear and emphatic in his evidence which I preferred to that of the Respondent's witnesses where the evidence disagreed.

Findings of Fact

4. The Claimant was employed from 15/7/2019 as a Managing Director of the Respondent, which trades as a recreational club. His salary was £75000 gross per annum. This was £6250 gross and £4256 net per month, and £1442.30 gross and £982.15 net per week.

5. His employment contract provided "*Notice period by employer: 1 month during the probationary period, eight weeks after the probationary period ends.*"
6. Clause 2 provided "*The first six months of employment will be your Probationary period. This period may be extended. During this period, your employment may be terminated without recourse to the disciplinary procedure.*"
7. On 12 September 2019 Mr Cross wrote to the Claimant to arrange a meeting on 26/9/2019 for the purposes of "*the formal motions of reviewing your performance*". On 16 September 2019 Mr Cross raised some "*points of concern*" with the Claimant which he responded to (RB50)
8. On 11/12/2019 Mr Cross made enquiries with a Ms N Saeed whether the Claimant's probation period could be extended. (RB45) This however was not communicated to the Claimant.
9. The first six month period came to an end on 14 January 2020 with nothing having been being communicated to the Claimant about whether or not his probation had ended or extended.
10. On 29/1/2020 Mr Cross sent an email to the Claimant making vague statements and ending by saying "*...I have to evaluate whether or not you are an acceptably safe pair of hands, ...*" (RB63) and he also sent another schedule of "*points and areas of concern*" for the Claimant to consider, and he responded (RB74-80).
11. The Respondent produced at some stage a document entitled "*8-week probationary review Form (Management)*" for the period 15/7/2019 to 15/1/2020. (RB66) This contained a suggestion that there would be a further probationary review on 15/4/2020. However the document was never given to the Claimant and he did not sign it.
12. On 5/2/2020 the Claimant had a meeting with Mr T Cookson and Mr P Cross. This meeting had previously been referred to in an email from the Claimant to Mr Cross sent at 10.24 that morning as "*an appraisal review*". There was a discussion lasting about 25 minutes during which they discussed areas of the Claimant's work which needed improvement, but neither Mr T Cookson and Mr P Cross told the Claimant that his probation period had been extended. As volunteered in the oral evidence of Mr Cross, the conversation was "*informal and easy-going*". No minute was taken and after the meeting no letter, email or other confirmation was sent informing the Claimant that his probation had been extended.
13. On 24/2/2020 the Claimant sent to Mr Cookson and Cross an email (RB81) which contains

the following:

Pete & Tim,

Thank you for your time the other week when you kindly undertook my 6 month probationary review and for affording me the opportunity to feedback to you on the progress I believe that I had made. I said that there had been many areas identified in the operational review that I submitted to the board where substantial progress and task completion had been achieved.

You pointed out also, some areas where further progress was required on my part and I acknowledged that there were areas for improvement that were still outstanding.

14. On 19 March 2020 HR agents for the Respondent sent the Claimant a letter with the subject line "*Termination of Employment within Probationary Period*" and terminating his employment with notice expiring on 19/4/2020. (RB89).

Assessment and Conclusion

15. There was power on the part of the Respondent employer to extend the probation period but no express provision as to how or when this power could be exercised. In order to give business efficacy to the contract it is necessary to imply a term that such an extension could only be made when the six month probation period was still running. If that was not so then the employer would have an unlimited power to retrospectively impose a probation period on the employee months or years after the initial agreed 6 months had expired, which would be incompatible with any reasonable employment relationship.
16. Furthermore, as a matter of simple logic, if the probation period had already expired, it no longer existed and there was nothing to be extended.
17. There must also have been an implied term that if the probation was to be extended, that the extension would be done by communicating it to the employee. If that was not the case the employee would not know that he or she was still subject to probation, and would not be able to act accordingly. Hence without such clear communication, there can be no extension.
18. Alternatively, the provision in the contract about extension of probation is ambiguous and falls to be interpreted in this way against the Respondent under the *contra proferentem* principle.
19. The Respondent's main defence is that the probation period was extended by express words spoken by Messrs Cross and Cookson to the Claimant at the meeting on 5/2/2020. In particular reliance is placed by the Respondent on the Claimant's email of 24/2/20, in which he referred to the meeting on 5/2/2020 as a 6 month probationary review, and also

recorded his knowledge that further progress by him was required. It was submitted that this was strong evidence that the Claimant must have been told expressly on 5/2/2020 that his probation had been extended.

20. I reject that defence on the facts – I find that there was no communication of this either orally or in writing. In any event by then it was too late to extend the probation period because it had already expired at midnight on 14 January 2020.
21. The email of 24/2/20 does indicate that when it was written the Claimant was aware that the Respondent was treating the meeting on 5/2/2020 as a delayed probationary review. That awareness was inadequate as a means of reviving a probation period which had already expired. The employment contract did not provide that if the Respondent delayed a meeting the employee should infer from that that his probation had been extended.
22. The email also indicates that after the meeting the Claimant knew that he was expected to improve and would be kept under further appraisal, but it goes no further than that. An employee being kept under appraisal does not necessarily mean that he is still on probation. Many, if not most, employees are kept under appraisal by their employers to some extent throughout the course of their employment, and so it does not follow from the fact that the Claimant was still under appraisal after 5/2/2020 that he must still be on probation then.
23. As already indicated, in my judgment, the effective means of extending the Claimant's probation in this case would have been to notify him clearly about this before the six month period expired. That plainly did not happen.
24. The Respondent having failed to effectively extend the Claimant's probation it follows that he was outside his probation period when he was dismissed. That being the case the termination letter was incorrect in stating that the Claimant was dismissed in the probationary period.
25. The Claimant claimed £6250 being his monthly salary gross of tax. During the hearing I said I would award that amount but I have reconsidered it as it would not be correct to do so.
26. I have found that the Claimant's contractual notice entitlement was 8 weeks, as he claimed it was. He was given notice on 19/3/2020 effective 19/4/2020 which was 31 days notice. I assume that he was paid in full for those 31 days, and in any event there is no claim for that period. The 8 weeks notice which should have been given was 56 days. Hence the notice he was given was $56 - 31 = 25$ days short. The salary figures work out as £1442.30

per week gross, £982.15 net per week and £140.30 net per day. As we are counting days of notice each and every day in the week is counted.

27. Had he been paid the proper notice pay he would have been paid net of tax. The purpose of damages is to put the receiving party in the same position he would have been in if the breach had not occurred. Hence the proper calculation of his damages for short notice pay is $25 \times £140.30 = £3507.50$. These damages should not be taxable in his hands as they are calculated net. The Respondent however must indemnify the Claimant against his having to pay any taxes or national insurance contributions in respect of that sum, in respect of which he has leave to apply.

28. The Claimant also claimed £1000 "*compensation*" which turned out to be a claim for his time in dealing with this matter. There is no basis for such an award in this case.

NOTE

The above judgment was given after a CVP open hearing. The tribunal considered it as just and equitable to conduct the hearing in this way. In accordance with Rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. At least one member of the public attended. From a technical perspective, there were severe difficulties. The internet connection was extremely slow. It was very hard to hear clearly what the participants were saying. I do not know where the problem lay as several internet connections were in play. I apologised to the parties and observers during the hearing for the poor quality hearing which resulted. However, given the relatively small amount at stake and the resources which had already been invested in the hearing, I did not think it appropriate to adjourn and neither party asked for this. I was able to read the relevant witness statements and documents, and form an impression of the witnesses and I am confident that I was able to grasp the essentials of the case so as to be able to deliver a considered judgment.

J S Burns Employment Judge
London Central
11/9/2020
For Secretary of the Tribunals

date sent to the Parties – 14/09/2020