



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr. B. Elam

v

Tolsa U.K. Limited

Heard by telephone

On: 18 August 2020

Before:

Employment Judge Wedderspoon

Representation:

Claimant:

Mr. Krigers, Solicitor

Respondent:

Mr. C. Sullivan, Managing Director

JUDGMENT

1. The breach of contract claim is well founded and succeeds.
2. The Claimant is awarded the total sum of £9,879.93.
3. The sum includes the following: -
 - (i) Outstanding pay £6,057.69;
 - (ii) Outstanding company car benefits £1,312.50;
 - (iii) Outstanding pension benefits £533.75;
 - (iv) Uplift of 25% for failure to comply with ACAS code.

REASONS

1. By claim form dated 27 April 2020 the claimant brought a claim for wrongful dismissal against his former employer, Tolsa U.K.
2. There was no dispute that the claimant was dismissed on 11 March 2020 by the respondent and paid 4 weeks' notice.
3. The issue to be determined by the Tribunal was "what was the correct contractual notice period to terminate the claimant's employment contract".

4. The claimant's case is that since he was employed for a period of more than 6 months by the respondent at the date of termination he was entitled to 3 months' notice. The respondent argues that the claimant was on an extended probation period and therefore was only entitled to a 4-week notice period.
5. There was an agreed bundle of 47 pages. I heard from the claimant and from Mr. Sullivan, the Managing Director of the respondent. I was also provided by the claimant's representative with a skeleton argument and a bundle of authorities.

Facts

6. The claimant was employed by the respondent from 15 August 2019 to 11 March 2020 as a national account manager.
7. At the commencement of the claimant's employment he was provided with a contract of employment. Clause 10 states

"Notice to terminate the employment

- a. *Your employment may be terminated by either party giving notice in writing as follows: -*

<i>Length of Service</i>	<i>Notice Period</i>
<i>0-6 months service (probation)</i>	<i>4 weeks</i>
<i>6 months service +.</i>	<i>3 months</i>

- b. *On termination of your employment (by you or the company) the company may either*
 - i. *Require you to work throughout your notice period, or require you to stay away from your place of work throughout your notice period, or*
 - ii. *Terminate your contract without notice and make a payment in lieu of notice to compensate you*

8. There was no express provision contained in the contract of employment to extend the probation period and no express provision referring to the notice required to terminate the contract in circumstances where the probation period was extended beyond 6 months.
9. Clause 11 of the contract provided for a non-contractual grievance procedure.
10. Clause 30 titled "unilateral variation of contract" provided a general right to the employer to unilaterally vary the contract of employment. It stated

"The Company reserves the right to amend the terms and conditions of your employment and its rules, procedures and policies from time to time. Such amendments will be notified to you in writing. Any changes to your terms and conditions will be deemed to be accepted unless you notify the company of any objection in writing within twenty-eight (28) days of the date that the company tells, hands you or sends you notification".

11. Further, at clause 31 titled whole agreement clause stated

"This contract contains the whole agreement between the employee and the company and supersedes all previous contracts, agreements, arrangements or understandings whether oral or written. No amendment to this contract will be legally binding unless made in writing and signed on behalf of the Company as a duly authorised person."

12. The Claimant had a meeting with Mr. Jonathan Khan, Consumer Sales manager, week commencing 4 November 2019 (page 35). He sent the claimant an email evidencing the discussions and the fact that he had raised with the claimant some performance issues including lateness, personal mobile use, little progress with the customer task list and lack of preparation of a sales meeting. The claimant was informed that it was important to see some improvement going forward.
13. A further meeting took place between the claimant and Mr. Khan on 3 February 2020 (page 37). The letter refers to the decision made to extend the claimant's probation by four weeks to give the claimant an "*opportunity to demonstrate your intention to raise your level of performance.*" Four areas of performance requiring improvement were enthusiasm, initiative, administration and business participation. At the end of the letter it is stated "*We will review your performance and approach over the coming weeks and hopefully see a significant improvement.*"
14. It is agreed by both the claimant and the respondent that there was no discussion about the claimant's contractual terms and conditions or how this amendment to the probation period would impact on any notice period to terminate the contract of employment or that the claimant had any contractual right to object to this variation. Further the notice period to terminate the contract in the circumstances was not referred to in any correspondence from the respondent to the claimant.
15. Mr. Sullivan's evidence was that it was his belief it was implicit that the extension to the claimant's probation period was to protect the respondent and give the claimant an opportunity to improve so that the notice period would remain at 4 weeks to terminate the contract even though the claimant would be employed for a 6-month period.
16. The claimant's evidence which was unchallenged in cross examination is that he felt he had to accept the probation extension otherwise he would lose his job straightaway. He did not object but was not told he was entitled to do so. However, he says he was not told by the respondent in these circumstances that his notice period, despite being employed for 6 months, would be reduced to 4 weeks.
17. On 11 March 2020 Mr. Khan wrote to the Claimant (page 38) referring to the claimant's poor performance. It stated "*it has been decided not to extend your probation further and to terminate your employment with Tolsa UK. You are entitled to two weeks' notice pay which will be paid in lieu at the normal monthly pay date and today will be your last day in the business.*" Even on the respondent's own case this was incorrect. The claimant was at the very least entitled to 4 weeks' notice.
18. On 11 March 2020 (p.39) the Claimant raised a grievance stating he had over 6 months service and was entitled to three months' notice. He set out his expectation of receiving payment in respect of all benefits which have ceased and which would have been payable during his notice period including use of a company car.
19. In response, Mr. Khan wrote on 12 March 2020 stating that the claimant's probation period was due to end on 15 February 2020. On the basis that his probation period was extended for a further 4 weeks to 14 March. It was stated that as the claimant was still within the probation period he was entitled to 4 weeks' notice pay and not three months. He was not invited to a meeting or

provided with a right of appeal and no explanation has been provided as to why this was the case.

Submissions

20. Mr. Krigers, submitted on behalf of the claimant, that clause 10 of the contract states that during the first 6 months of employment, his notice period is 4 weeks. After 6 months of service the notice period increases to 3 months. At the date of notice of termination on 11 March 2020 the claimant had over 6 months service. He met the one and only requirement under clause 10a so to become entitled to a 3-month notice period.
21. It was submitted that the respondent's letter dated 2 February 2020 did not refer to the notice period at all but purported to extend probation. No amendment to the claimant's notice provision was discussed with the claimant or set out in writing. The claimant did not object but it was not explained to him that it was proposed his notice period would remain at 4 weeks.
22. Mr. Krigers submitted that there was no unilateral variation of the termination of notice provisions. He relied upon Lord Woolf's comments in the case of **Wandsworth London Borough Council v D'Silva (1998) IRLR 193** where he stated

"The general position is that contracts of employment can only be varied by agreement. However, in the employment field an employer or for that matter an employee can reserve the ability to change a particular aspect of the contract unilaterally by notifying the other party as part of the contract that this is the situation. However, a clear language is required to reserve to one party an unusual power of this sort. In addition, the court is unlikely to reserve to one party an unusual power of this sort. In addition, the court is unlikely to favour an interpretation which does more than enable a party to vary contractual provisions with which that party is required to comply. To apply a power of unilateral variation to the rights which an employee is given could produce an unreasonable result and the courts in construing a contract of employment will seek to avoid such a result."

23. Mr. Krigers submitted that there was no effective variation to the notice of termination of the contract. The fact that the claimant continued to work for the respondent does not show he had impliedly agreed to reduce his notice entitlement after 6 months employment (**Jones v Associated Tunelling Co Limited (1981) IRLR 477** and **Aparau v Iceland Frozen Foods plc (1996) IRLR 119**). He placed significance reference to the latter case where the unilateral imposition of a mobility clause had no immediate practical effect. Further, he submitted that the claimant was not in a realistic position to object to the extension of probation because he would have been dismissed. He relied upon the **Jones** case at page 6 paragraph 1 which states

"Even if he does read the statement and can understand it, it would be unrealistic of the law to require him to risk a confrontation with his employer on a matter which has no immediate practical impact on the employee. For those reasons as at present advised we would not be inclined to imply any assent to a variation from mere failure by the employee to object to the unilateral alteration by the employer of the terms of employment contained in a statutory statement."

24. Mr. Krigers submitted that this was a unilateral variation with no opportunity for the claimant to object; see the respondent's letter. He also submitted no valid consideration was provided as mere continuance of employment is insufficient consideration in relation to the changes to the employment contract.
25. He submitted that the claimant was entitled to notice monies plus an uplift for a failure to comply with the ACAS grievance procedure.
26. Mr. Sullivan submitted on behalf of the respondent that it was implicit from the discussion with the claimant and from a letter sent to the claimant on 2 March 2020 that the claimant's notice period remained at 4 weeks with an extension of his probation period. He accepts that this was not expressly stated but believes it was made clear to the claimant that the extension of the probation protected the respondent and gave the claimant an opportunity to improve for which the claimant was grateful.

Conclusions

27. In my Judgment, the respondent's purported variation of the claimant's employment contract to extend the probation period and the implications of the notice period to terminate the claimant's contract contained in its letter 3 February 2020 lacked clarity. The contract does not provide for an express term to extend probation and maintain the limited contractual notice period to terminate at 4 weeks. Instead the way in which the contract is drafted is that after 6 months employment the contract (clause 10) can be determined with 3 months' notice.
28. The respondent's right of unilateral variation of the contract contained in clause 30 requires the respondent to notify the claimant in writing of any such amendments. The letter of 3 February 2020 was silent as to the intended impact of extending the claimant's probation period on the notice period to lawfully terminate the contract. Although clause 30 provides a right for an employee to object within 28 days, it was unclear from the letter of 3 February 2020 what the claimant would be objecting to, save to an extension for a period of probation. He was unaware that he could (as the respondent say it intended) be dismissed with 4 weeks' notice as opposed to 3 months' notice because the respondent did not inform him orally or in writing.
29. Insofar that the respondent seeks to rely upon the general right retained to unilaterally vary the contract (clause 30), I find that the letter dated 3 February 2020 did not unilaterally vary the contract so that the respondent could both lawfully extend probation and terminate the claimant's contract with 4 weeks' notice. The respondent's letter of 3 February 2020 did not contain the necessary basic elements namely stipulating probation would be extended and it meant the respondent could terminate on 4 weeks' notice. It did not inform the employee with clarity what the consequences of its intention would be. In order to unilaterally vary an employee's contract an employer is required to be clear what term is being varied and its significance to the continuing relationship with the employer. It was not clear to the claimant here.
30. Even if the respondent is correct that it was implicit that the unilaterally imposed extension of the probation would mean the claimant could be dismissed in four weeks, I do not find that the claimant continuing to work for the respondent meant he agreed to a 4-week notice period. The unilateral imposition of the clause had no immediate practical effect. I take into account the cases of **Aparau v Iceland**

Frozen Foods plc (1996) IRLR 119 where the unilateral imposition of a mobility clause had no immediate practical effect.

31. For these reasons I uphold the claimant's breach of contract claim and I find that the claimant was entitled to 3 months' notice. I award the claimant the sums sought in his schedule of loss.

Employment Judge Wedderspoon

Date: 28 September 2020

Sent to the parties on:

Date: 30 September 2020