EMPLOYMENT TRIBUNALS

Claimant: **Mr M Taylor**

Respondent: **Runtech North Limited**

On: **21 April 2021**

Before: **Employment Judge McAvoy Newns**

Appearances:

For the Claimant: **In person**

For the Respondent: **Mr L Grime, Consultant**

JUDGMENT

1. The Claimant's claim for breach of contract brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623 is well-founded and succeeds.

2. The Respondent is ordered to pay the Claimant the sum of £2,332.80. This is a gross sum and the Claimant is responsible for the payment of any income tax and/or national insurance contributions that may be due on it.

REASONS

Background and issues

1. This has been a remote hearing which has not objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

2. Having started the ACAS early conciliation process on 13 November 2020, on 20 November 2020 (the date of completion of the ACAS early conciliation process), the Claimant brought a claim against the Respondent for notice pay, holiday pay and a statutory redundancy payment.

3. This hearing had been listed for one hour. At the outset, the Claimant confirmed that he had been paid one week's notice, all of his outstanding holiday pay and his statutory redundancy payment; therefore, his claim was limited to his outstanding notice pay in the sum of £2,332.80. The Respondent confirmed this was its understanding of the Claimant's claim.

4. The Respondent accepted that this sum had not been paid. This was because the Claimant had not worked his notice period. The Respondent accepted that it had previously agreed to pay the Claimant in lieu of his notice but asserted that this was a "mistake" which arose because the Respondent was not permitted to pay the Claimant in lieu of his notice and doing so would amount to a breach of the Claimant's contract of employment.

Evidence

5. The Claimant did not serve a witness statement and consequently it was agreed that the contents of his ET1 would comprise his evidence. The Respondent questioned the Claimant on such evidence. On behalf of the Respondent, Samantha Rogers (HR Adviser) gave evidence, which was not challenged by the Claimant and, therefore, I have accepted Ms Roger's evidence in full. I also had sight of a bundle of documents containing 41 pages.

Findings of fact

6. The Claimant's continuous employment with the Respondent commenced on 30 September 2013 (after joining the Respondent following a TUPE transfer on 5 November 2017).

7. The Claimant and Respondent entered into a contract of employment on 23 December 2017. Clause 7 stated that, as the Claimant had more than two years' service, he would be entitled to one week's notice per year of service up to a maximum of 12 weeks' notice. This mirrored the Claimant's statutory entitlement to notice.

8. It was common ground that this contract did not contain a provision allowing the Respondent to make a payment in lieu of notice and that, based on this contract, had the Respondent paid the Claimant in lieu of notice, it would have been in breach.

9. This contract did not state that a specific mechanism was required to vary it.

10. Towards the end of 2020, the Respondent started a redundancy consultation process involving the Claimant. On 2 November 2020, during the final consultation meeting, Ms Rogers informed the Claimant that he would be paid in lieu of his notice and his employment would terminate with effect from that date. Although the evidence in relation to this was unclear, it appeared that a similar point was made during the preceding consultation meeting, on 30 October 2020.

11. This decision was then confirmed in writing to the Claimant on 2 November 2020. Specifically, this letter, which was sent by Ms Rogers on behalf of the Respondent, on the Respondent's letterhead, stated:

"A decision has therefore now been taken that your employment will, therefore, terminate by reason of redundancy on Monday 2nd November. You will be paid up to your last day of employment in the normal way. You will be entitled to notice of 7 weeks' entitlement. This will be subject to the usual deductions of tax and national insurance as normal. You will not be required to work your notice period".

12. That day, the Respondent informed the Claimant that he would receive his final payment on 13 November 2020. The Claimant replied: *"OK thanx again".*

13. After this was confirmed, the Claimant believed that he would not be required to undertake any additional work for the Respondent and that he would receive a payment in lieu of his seven week notice period. Relying on this, he booked external training courses to assist him with securing an alternative job and booked his personal vehicle into the mechanic's garage.

14. On 3 November 2020, Ms Rogers telephoned the Claimant and informed him that there had been a mistake and he was required to work his notice period. Ms Rogers explained that this mistake had come to her attention following a discussion with the Respondent's Directors. The basis of this mistake was not explained and there is no evidence of the Respondent informing the Claimant at the time that this mistake had to be rectified because otherwise the Respondent would be in breach of the Claimant's contract of employment.

15. In an email sent at 14.45 on that date, Ms Rogers stated:

"I had previously told you that you would be paid your notice in lieu. However, as explained, this was a mistake as we do in fact require you to work your notice period".

16. On 4 November 2020, John Coupland, the Claimant's manager, had a discussion with the Claimant to confirm the days that the Claimant was expected to work. The Claimant raised with Mr Coupland the fact that he had arranged external training courses to assist with his search for alternative employment. The Claimant's evidence was that Mr Coupland had only told him that he needed to work for one week.

17. On 5 November 2020, Ms Rogers wrote to the Claimant stating:

"Your notice is contingent on you working the days that we require you… To finalise, we expect you to be available for work when required during your notice period, if you do not attend you will not be paid".

18. The Respondent also allowed the Claimant to take annual leave in order to attend the above mentioned training courses provided he could evidence the fact that he had attended such courses.

19. On 11 November 2020, Ms Rogers emailed the Claimant asking him to inform the Respondent of his intentions. He responded stating:

"There was no agreement that I would get my 7weeks notice paid weekly…there for iam giving you 7days to pay in full what iam owed if payment is not maid then I will take legal action".

20. On 16 November 2020, Ms Rogers emailed the Claimant stating:

"I have confirmed with both Peter Miles and Jon Coupland that you are required to work 8am to 4pm each day, Monday to Friday, until the end of your notice period. Your final working day being the 18th December 2020 and your final pay then being received 24th December 2020. Failure to attend work during this time will result in no payment being made each week as this is a requirement as per your redundancy package".

21. The Claimant did not undertake any further work for the Respondent and, save as for one additional week's pay, the Respondent did not pay the Claimant his notice pay.

22. The evidence in relation to the Claimant's employment status after 2 November 2020 was unclear. As a result of the letter of the same date, the Claimant believed that his employment with the Respondent terminated on 2 November 2020. The Respondent pleaded the same at paragraph 2 of its grounds of resistance. However, elsewhere the Respondent stated that employment terminated on 18 December 2020. This is addressed in the conclusions section.

Submissions

23. The Respondent submitted that the Claimant signed a contract of employment which provided that the Claimant was entitled to seven weeks' notice of termination. On 2 November 2020 the Respondent informed the Claimant that he would be paid in lieu of his notice but this was a mistake which was immediately rectified. The Claimant's contract of employment did not permit the Respondent to pay him in lieu of his notice. To do so would have amounted to a breach of contract. The Claimant was told that he needed to work his notice, otherwise he would not be paid for it, and time off was granted to enable the Claimant to undertake the training courses that he had arranged. The Respondent quoted the below two authorities: ***Miles*** and ***Rogers*** but agreed

when asked by me that they were distinguishable from the Claimant's case because, in both those cases, there was no agreement from the respective employer to pay the employee in lieu of their notice. Upon asking whether the Respondent had any relevant authorities on the doctrine of mistake for me to consider, I was told that it did not.

24. The Claimant submitted that he expected to receive his redundancy payments, which included his notice pay, on 6 November 2020 and was informed that a mistake had been made but he would receive the payments the following week, on 13 November 2020, which he accepted. He submitted that he did not work his notice because he was told that he would not have to both during the two consultation meetings and in his dismissal letter.

The Law

25. Section 86 of the Employment Rights Act 1996 (the "ERA") states:

(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—

(a) is not less than one week's notice if his period of continuous employment is less than two years,
(b) is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and
(c) is not less than twelve weeks' notice if his period of continuous employment is twelve years or more.

(2) …
(3) Any provision for shorter notice in any contract of employment with a person who has been continuously employed for one month or more has effect subject to subsections (1) and (2); but this section does not prevent either party from waiving his right to notice on any occasion or from accepting a payment in lieu of notice.

26. Section 91(4) of the ERA states: *"If, during the period of notice, the employee breaks the contract and the employer rightfully treats the breach as terminating the contract, no payment is due to the employee under section 88 or 89 in respect of the part of the period falling after the termination of the contract".*

27. Pursuant to Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623 ("Order"):

Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if-

(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;
(b) the claim is not one to which article 5 applies; and
(c) the claim arises or is outstanding on the termination of the employee's employment.

28. The position at common law is that a notice, once validly given, is effective and can neither be "refused" by the recipient nor "withdrawn" by the person giving it, without the other's agreement. In order to be validly given notice should be clear and unambiguous.

29. In ***Harris and Russell Ltd v Slingsby [1973] ICR 454***, it was held by National Industrial Relations Court that where one party to a contract gave notice determining that contract he could not thereafter unilaterally withdraw his notice.

30. In ***Miles v Wakefield MBC [1987] 2 W.L.R. 795*** a superintendent registrar had a normal working week consisting of 37 hours work, including three hours on Saturday mornings, which was the most popular time for weddings. In 1981 his trade union instructed him to refuse to conduct weddings on Saturdays as part of industrial action. He complied. He remained willing to work a 37 hour week and attend on Saturdays to do other work. The council made it clear that it did not accept this and deducted part of his salary representing the three hours. He brought an action for damages for the lost wages which was appealed to the then House of Lords. They found that his right to remuneration depended on his being willing to do the work that he was employed to do and if he declined to do the work the employer need not pay him. His salary was therefore properly deducted.

31. In ***Sunrise Brokers LLP v Rodgers [2014] EWCA Civ 1373***, R had been employed by S under a contract providing for termination by R on 12 months' notice in writing. The contract also provided that R would not work for any of S's competitors for six months post-termination. In March 2014 R signed an employment agreement with one of S's competitors (E) and told S that he wanted to leave immediately. S did not accept R's resignation. R left and did not return. S refused to put R on garden leave and did not pay him, but indicated that it would accept notice of termination expiring in October. The judge granted S a declaration that R remained employed until October, and restrained him from working for E for a further four months post-termination. R argued that the judge had erred in requiring him to remain employed by S in the absence of any undertaking by S to pay his salary. R's appeal was dismissed and in respect of this point it was held that R did not challenge the judge's finding that he had no contractual entitlement to be paid because he was not ready to work. Furthermore, any obligation on S had to be based on the fact that it sought injunctive relief. Although it was common practice for an employer obtaining relief to undertake to pay the employee whether he worked or not, it was important to identify the rationale for that practice. The rationale was that the court would not order specific performance of a contract for personal services; the court would also not grant an injunction to enforce a

prohibition on an employee from working for anyone other than the employer if that would produce the same result indirectly. Accordingly, the only relevant principle was that an injunction should not be granted where the effect would be to compel the employee to continue to work for the employer. If the employer did not undertake to pay the employee, it might fall foul of that principle, but whether that was the consequence would depend on the facts of the case. That issue was often expressed as whether the injunction would reduce the employee to "idleness and starvation". Financial hardship short of destitution could suffice to engage the principle. A realistic evaluation was required of whether the pressures on the employee in the particular case were liable to compel him to return to work for the employer. R's contract still subsisted, and it was only because of his own unwillingness to perform his obligations under it that he was not being paid. Further, the length of the restraint was a crucial consideration in the compulsion question. R had advanced almost no evidence establishing that preventing him working for E would cause him serious financial hardship. On the facts, the judge had been entitled to find that the injunction without an undertaking would not compel R to work for S.

Conclusions

32. I am to a large extent required to determine this case based on the evidence, and representations, put before me today. I do however have to be mindful of the fact that the Claimant is a litigant in person. Whilst I should not seek to make his case for him, I should consider the legal principles relevant to the points that he makes, even if he does not cite the relevant legal authorities himself. The same, however, does not apply to the Respondent who, in this case, was legally represented.

33. The Respondent notified the Claimant, in clear and unambiguous language, that his employment would terminate on 2 November 2020 and he would be paid in lieu of his notice period.

34. Although the Respondent has not challenged whether the letter dated 2 November 2020 formed a binding contract, I find that it contains all the essential ingredients: in consideration of the Claimant's employment being terminated (which was a legal relationship), the Respondent offered (i) to forfeit the requirement for the Claimant to work his notice and (ii) to pay the Claimant in lieu of his notice. The Claimant accepted this offer. Consequently, a binding agreement, on these terms, was in place.

35. Therefore, I conclude that the Claimant's employment was due to terminate on 2 November 2020 and the Claimant was contractually entitled to receive a payment in lieu of seven weeks' notice.

36. Relevant to the applicability of the Order, as the letter dated 2 November 2020 was terminating the Claimant's employment, it was connected with the Claimant's employment.

37. This gives rise to the question whether the Respondent can seek to vary or withdraw this notice without the Claimant's consent. Considering the common law position outlined above and the decision in ***Slingsby,*** I conclude that it could not. Furthermore, the Claimant did not consent. Consequently, and subject to the below, the terms outlined at paragraph 34 above remained binding on the parties.

38. The Respondent stated that a "mistake" occurred but provided no authorities for me to consider on this point. Furthermore, this scenario does not appear to give rise to the common "mistake" scenario more frequently considered by the Courts.

39. Although not given at the relevant time, the only reason given by the Respondent to explain that the relevant contents of the 2 November 2020 letter were included by mistake was that it would be a mistake to pay an employee in lieu of their notice period when the contract does not permit it. I do not conclude that this is a mistake, in the ordinary sense of the word. There is no statutory bar to an employee accepting a payment in lieu of notice, irrespective of what the contract says, as the Claimant did here. Paying in lieu of notice absent a contractual right may, in some circumstances, create other problems for the Respondent, however, in circumstances where the employee has accepted the decision without complaint, I do not find this amounts to a "mistake" in the manner asserted by the Respondent.

40. The Respondent did not assert that and/or adduce evidence that a mistake had occurred because Ms Rogers did not have authority to enter into the contract on 2 November 2020. It also did not assert that and/or adduce any evidence that Ms Rogers had misunderstood the instructions of her superiors. It also did not assert and/or adduce evidence that Ms Rogers had based the letter dated 2 November 2020 on an incorrect template. Therefore, I have not considered these points.

41. The authorities of ***Miles*** and ***Rogers*** have provided little assistance with this case. This is not a straightforward case of an employee refusing to work and therefore the employer refusing to provide payment, as is the case in ***Miles***. In respect of ***Rogers,*** the facts of the Claimant's claim are entirely distinguishable. That claim concerned the employer's decision to not pay the employee when it asked to be released from employment early having decided to join a competitor notwithstanding its restrictive covenants.

42. In relation to section 91(4) of the ERA, I find that the Claimant did not break his contract with the Respondent. Instead, this contract was varied by the letter dated 2 November 2020 and his employment terminated on that date. If I am wrong about this, and employment terminated on 18 December 2020, there is no evidence of the Respondent seeking to terminate the contract in response to the Claimant's alleged breach, as this provision requires.

43. Consequently, the Respondent has breached the Claimant's contract (as set out in the letter dated 2 November 2020) by not paying him is contractual entitlement to notice, which mirrored his entitlement under the ERA. This sum

arose on the termination of the Claimant's employment. Therefore, the Claimant's claim succeeds.

Employment Judge McAvoy Newns
30 April 2021

Sent to the parties on: 30 April 2021