EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A. CARABIN	**v**	**CALYPSO TECHNOLOGY LIMITED**

Heard at: London Central (by video) **On**: 29 April 2021

Before: Employment Judge P Klimov, sitting alone

Representation

For the Claimant: Mr D. Stephenson (of Counsel)

For the Respondent: Miss S. Berry (of Counsel)

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable due to the Coronavirus pandemic restrictions and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The Claimant's claim for the sum of £120 representing his expenses is dismissed on withdrawal.

2. The Claimant's claims for breach of contract (notice pay) fails and is dismissed.

REASONS

Background and Issues

1. By a claim form dated 21 December 2020, the Claimant brought a claim for breach of contract in respect to his notice pay and expenses. He claims that the

Respondent was in breach of contract by dismissing him on two weeks' notice where under the terms of his contract of employment he was entitled to three months' notice. He also claims £120 for incurred but unpaid expenses.

2. The Respondent denies that the Claimant was entitled to three months' notice because at the time of the Respondent dismissing the Claimant, he was still on his probationary period[1] during which the Respondent was entitled to dismiss the Claimant on two weeks' notice, and it gave the Claimant two weeks' notice of dismissal.

3. Before the hearing, the Respondent had paid the Claimant £80 with respect to his expense claim. At the hearing, the Respondent agreed to pay the remaining £40, and on that basis the Claimant withdrew his claim for expenses.

4. Mr Stephenson appeared for the Claimant and Miss Berry for the Respondent. I am grateful to them for their assistance to the Tribunal. The Claimant gave sworn evidence and was cross-examined. Mr Darren Ali, Global Head of HR & Talent of the Respondent, gave sworn evidence for the Respondent and was cross-examined.

5. I was referred to documents in a bundle of documents of 45 pages. There were further documents appended to the witness statements, which I was referred to by the parties. The was also a supplemental bundle of interparty correspondence. The documents in the supplemental bundle did not appear immediately relevant to the issues I needed to decide, and I had not read them before the hearing. At the start of the hearing, Miss Berry told me that there were some without prejudice correspondence in the interparty correspondence bundle. I said that I had not read those documents and the parties confirmed that I did not need to read them for the hearing. The parties did not refer me to the documents in the supplemental bundle during the hearing.

6. The following list of issues was agreed by the parties.

Breach of Contract Claim - Notice Pay

1. It is agreed between the Parties that the Claimant was paid two (2) weeks' notice for the period between 16 and 30 November 2020 (para. 9 GOR).

[1] In this judgment I use the terms "probationary period" and "probation period" interchangeably.

*2. Was the Claimant entitled to three (3) months' notice pursuant to clause 17.1 of his contract of employment dated 26 June 2020 (**sic – the correct date 23 April 2020**)? The questions the Tribunal will need to determine in respect of this issue are:*

i. On what date did the Claimant "join the Company"? The Respondent contends that the Claimant joined on 29 June.

3. If so, is the Claimant entitled to damages totalling £31,731?

7. As the hearing was listed for 3 hours, I agreed with the parties that I should first determine the second issue and deal with the third issue, if remained relevant, at a separate remedy hearing. In any event, the Claimant did not present any mitigation evidence, which would have been necessary for me to determine the third issue.

8. The Claimant contends that his employment with the Respondent started on 26 June 2020, and in the alternative, that even if his employment started on 29 June 2020, he was still entitled to three months' notice on construction of clause 7.1 of his contract of employment.

9. Further, in his particulars of claim the Claimant avers that "*the Respondent unreasonably exercised such a right by extending his probation and without reasonable justification. As such, it is contended that the extension of the Claimant's probationary period was unlawful.*" At the start of the hearing, I confirmed with Mr Stephenson that this contention was being advanced as a point of legal construction of clause 7.1 and not as a factual dispute whether there was a breach of implied term of trust and confidence by the Respondent in extending the Claimant's probationary period.

10. After the hearing, on 4 May 2021, I received emails from the Respondent's solicitors, which they had sent to the Tribunal on 29 and 30 April 2021 and the Claimant's solicitors' response of 30 April 2021. By those emails the Respondent applied to introduce further documentary evidence on the issue of the Claimant's employment commencement date.

11. In its application the Respondent said that these additional documents were crucial evidence as they contradicted the Claimant's oral evidence to the Tribunal that he never wished or had not agreed to change the start date of his

employment with the Respondent. The Respondent said that the reason these documents had come to light only after the hearing was because the Claimant had failed to disclose them and because the allegation of the Respondent unilaterally changing the Claimant's start date only became apparent from the Claimant's witness statement which had been exchanged only on the eve of the hearing, and that was the Claimant who had unreasonably delayed the exchange. The Respondent's solicitors said that for these reasons they had not had an opportunity to take instructions on that allegation before the hearing and the Respondent had not been able to search for relevant documents.

12. The Claimant's solicitors opposed the application on the ground that the hearing had been concluded, evidence had been given, and legal submissions had been made. Therefore, they submitted, no additional evidence could be considered by the Tribunal.

13. While when I received the Respondent's application on 4 May 2021, my judgment had not been "perfected", as I was still finalising my reasons, I had already made my substantive decision on all the issues in the case. I decided that it would not be in accordance with the overriding objective under Rule 2 of the Employment Tribunals Rules of Procedure, which requires me to deal with the case fairly and justly, for me to review and admit the additional documents without those documents being put to the Claimant in the context of his oral evidence to the Tribunal and for the parties to make further submissions to the Tribunal. That would have required recalling the parties for a further hearing.

14. I decided that, while such documents might potentially assist the Tribunal, I had sufficient evidence to make my judgment, which by then I had already made, and recalling the parties to deal with the additional documentary evidence would be disproportionate and not in the interest of justice.

15. Accordingly, I decided that I must not review the submitted documents before finalising my reasons and I did not do that.

Findings of Fact

16. The Claimant was offered by the Respondent and accepted employment in the role of Group Financial Controller on 23 April 2020. The Claimant's

employment contract dated 23 April 2020 contained the following relevant terms:

1. Date of Commencement

1.1 Your employment with the Company will commence on June 26, 2020 and will continue until terminated in accordance with the section entitled "Termination of Employment" below.

*7. **Probationary Period***

7.1 Your probation period will be for a period of three (3) months from the date of joining the Company or such further period as may be communicated to you in writing. During the three (3) months probationary period, we reserve the right to terminate your employment at anytime without the obligation to pay out the remainder of the three (3) months. Termination of employment will be given with a two (2) week notice period. Your probation period will conclude at the end of three (3) months, unless you are specifically notified in writing that your probation will be extended."

*17. **Termination of Employment***

17.1 This Agreement may be terminated by you or by the Company upon giving three (3) months written notice, or such other longer period as may be required by law.

24.4 Paragraph headings are inserted for convenience only and will not affect the construction of this letter.

17. Shortly before the Claimant was due to start his employment with the Respondent he spoke on the telephone with Mr Ali and was advised that he should start on Monday 29 June 2020, instead of Friday, 26 June 2020.

18. The Claimant's first day at work with the Respondent was 29 June 2020. There were various internal announcements about the Claimant starting on 29 June 2020. The Claimant saw those announcements. The Claimant was paid his salary from 29 June 2020.

19. The Claimant was given various tasks by his manager, Ms Helene Koutsoudakis, including to complete reconciliation of the revenue accounting within three months of starting in the job. The Claimant did not complete that task within three months.

20. On 20 September 2020, the Claimant was told that his probationary period would be reviewed by Ms Koutsoudakis at a meeting on 28 September 2020.

21. On 28 September 2020, Ms Koutsoudakis informed the Claimant that his probation would be extended because he had failed to complete the reconciliation task within three months. That was confirmed by a letter sent to the Claimant by email on 29 September 2020. The letter said that the probationary period had been extended for another three months and that with that extension it was scheduled to end on 25 December 2020. The covering email from Ms Joelle Jouan, of the Respondent's HR, stated: "*attached letter confirms that the probation period has been extended for another three months i.e. December 25, 2020.*"

22. The Claimant did not raise any formal objections to the extension of his probationary period.

23. On 16 November 2020, the Respondent, having decided that the Claimant's performance was not at the level required, terminated the Claimant's employment by giving two weeks' notice of the termination, with the effective date of termination of 30 November 2020.

The Law

24. For the present purposes, the law on construction of contractual terms and on implied terms can be summarised as follows:

    a. Construing the words used in a contract and implying additional words are different processes governed by different rules. Only after the process of construing the express words is complete, the issue of an implied term falls to be considered. (*Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and anor 2016 AC 742, SC*)

b. When interpreting express terms of a contract, the aim is to give effect to what the parties intended. In ascertaining that intention, the words of the contract should be interpreted in their grammatical and ordinary sense, assessed in the light of any other relevant provisions of the contract, the overall purpose of the clause and the contract, the facts and circumstances known or assumed by the parties at the time that the document was executed, and commercial common sense, but disregarding subjective evidence of any party's intentions. (*Chartbrook Ltd and anor v Persimmon Homes Ltd and anor 2009 1 AC 1101, HL*)

c. Implied terms can supplement the express terms of a contract but cannot contradict them (*Johnson v Unisys Ltd 2001 ICR 480, HL*). However, in certain circumstances, implied terms may be used to qualify express terms, or at least restrict the way in which they are applied in practice (*Johnstone v Bloomsbury Health Authority 1991 ICR 269, CA*).

d. A term could only be implied if, without the term, the contract would lack commercial or practical coherence. A term should not be implied into a contract merely because it appeared fair or because the parties would have agreed it if it had been suggested to them. (*Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and anor 2016 AC 742, SC*)

25. It is a well-established rule of construction in contract law that any ambiguity shall be resolved against the party who seeks to rely on it to avoid obligations under the contract (the '*contra proferentem rule*').

26. An agreement to vary the terms of a contract is not required to be in writing to have legal effect. Regardless of whether an employee's statutory statement of terms and conditions is altered to reflect the change, whether there has been a consensual variation of the terms of the employment depends on the evidence in the particular case (see *Simmonds v Dowty Seals Ltd 1978 IRLR 211, EAT*).

27. Continuing to work in the face of a variation which has immediate effect may be taken as an implied acceptance of the variation. However, the inference must arise unequivocally, if the employee's conduct in continuing to work is reasonably capable of a different explanation, it cannot be treated as

constituting acceptance of the new terms (see *Abrahall and ors v Nottingham City Council and anor 2018 ICR 1425, CA*). In *Abrahall* (109, 110) Sir Patrick Elias said (my emphasis):

> ***I do not see why in an appropriate case the employee should not be taken to have accepted the variation in order to avoid the risk of redundancy. If the fear of redundancy can only be avoided by accepting the new terms, it is wholly artificial to treat these as separate and distinct reasons for failing to complain****.*
>
> *It may be said that the employee should never be held to have accepted a variation simply by working without protest under the new terms without more. After all, a party can bring a claim for breach of contract within the limitation period without having to notify the other party that he objects to the breach, and why should this be different?* ***I think that the answer lies in the fact that the employment relationship is typically a continuing relationship based on good faith, and exceptionally in that context it might be appropriate to infer that a failure to complain about a proposed variation of the contract for the future may be taken as agreement to that variation which prevents it constituting a breach****. It might also be said that an employer can always put the position beyond doubt by lawfully terminating the contract on notice and introducing the varied contract which includes the new disadvantageous term or terms. No doubt the employer's reluctance to do that is in part motivated by a desire to avoid potential unfair dismissal claims. But there are also less selfish reasons. In the context of a continuing relationship based on good faith, dismissing and re-employing might appear to be an unnecessarily hostile stance, only to be adopted as a last resort.* ***Attempts to secure agreement should not be discouraged and exceptionally the circumstances may justify the inference that the employee has agreed to the new terms even where he has been reluctant to do so formally***.

Discussion and Conclusions

28. The first issue I need to determine is one of construction of the Claimant's contract and in particular clause 7.1. In constructing the contract, I applied the principles outlined in paragraphs 24 and 25 above.

29. There were several areas of disagreement on construction between the parties. These were:

    a. The meaning of the phrase "*the date of joining the Company*",

    b. Whether the probationary period could only be validly extended before the expiry of the initial three months' period (first and fourth sentences),

c. Whether the third sentence shall be construed to mean that the Respondent was entitled to terminate the Claimant's contract on two weeks' notice only during the first three months of the probationary period, but not during its extension, and

d. Whether a term should be implied to the effect that the Respondent is not entitled to extend the probationary period "*unreasonably*" or "*without reasonable justification*".

"date of joining the Company"

30. The Claimant submits that "*the date of joining the Company*" shall have the same meaning as the date of commencement in clause 1.1 of the contract - "*Your employment with the Company will commence on June 26, 2020*", i.e. 26 June 2020, irrespective of the fact that the Claimant first day at work was 29 June 2020.

31. The Respondent argues that the date of 26 June 2020 was merely an anticipated date agreed between the parties on 23 April 2020, and there were various factors that could have caused that date to change, including the Claimant not being able to start on that date due to his contractual commitments to his previous employer, the Claimant wanting to take some time off, or the Respondent's background checks still not being completed.

32. The Respondent further argues that the purpose of the probationary period is to check whether the employee has the necessary skills and aptitude to do the job and that can only be done when the employee starts performing the job. Therefore, the term "*the date of joining the Company*" should have the meaning as the date the employee actually commences the performance of his duties.

33. In my judgment, the correct meaning of the words "*the date of joining the Company*" must be the date when the Claimant actually commenced working for the Respodent, and that was on 29 June 2020. The fact that the contract in clause 1 stated that his employment would commence on an earlier date, in my judgement, is irrelevant, because as a matter of fact it did not. He did not start performing his duties for the Respondent until 29 June 2020 and therefore, in my judgment, he did not "*join*" the Respondent until 29 June 2020.

34. Even if the Claimant not joining the Respondent on 26 June 2020 was because of a breach of contract by the Respondent in it unilaterally changing the Claimant's employment commencement date (and I will deal with this issue later in my judgment), in my view, this does not mean that the words of "*the date of joining the Company*" should be interpreted as the date that the Claimant would have joined the Respondent but for the Respondent's breach. This, in my judgment, would be an impermissible departure from the ordinary sense of the words, considering the overall purpose of the clause and the facts and circumstances known or assumed by the parties at the time that the contract was agreed, i.e. on 23 April 2020.

35. I accept the Respondent's evidence that the date of 26 June 2020 was not "set in stone", and there were various factors, internal and external that could have changed that date. The fact that they did not occur in relation to the Claimant (other than delaying his start date from Friday to the following Monday) does not mean that at the time of the conclusion of the contract on 23 April 2020 those factors could not have been reasonably contemplated by the parties as possible events that might impact on the Claimant's employment commencement date.

Could the Respondent extend the Claimant's probationary period after the expiry of the initial three months' period?

36. The Respondent contends that the clause should be interpreted as allowing the Respondent to extend the probationary period even after the expiry of the initial three months within a "reasonable period" thereafter. Miss Berry argued that there should be some "leeway" allowing the Respondent to do that.

37. I disagree. Firstly, such "late extension" will not be "extending" but "renewing" the probationary period. Secondly, it will introduce unnecessary ambiguity in the operation of the contract. It would not be clear to the parties how long that "leeway" could be and therefore whether the Claimant would still be on probation at the end of the initial three months if he had not been informed of the extension before the expiry of three months. Miss Berry could not give me any clear indication on where such "leeway" line should be drawn. Finally, implying such a term would effectively mean amending the first sentence to

read something along the lines: "*Your probation period will be for a period of three (3) months from the date of joining the Company or such further period as may be communicated to you in writing, during the first three months of the probation period of within a reasonable period thereafter*." and the fourth sentence to read: "*Your probation period will conclude at the end of three (3) months, unless you are specifically notified (during or within a reasonable period after the end of the first three months of the probation period) in writing that your probation will be extended*." That, in my judgment, would amount to re-writing the contract terms which would require the parties' agreement. The clause, as written, does not lack commercial or practical coherence without such additional words and I see no reason to imply them.

38. Therefore, I find that under the terms in clause 7.1, to extend the Claimant's probationary period the Respondent had to notify the Claimant in writing before the expiry of the initial three months' probationary period.

How much notice the Claimant was entitled to receive during the extended period of probation?

39. Mr Stephenson submits that irrespective of whether the Respondent was entitled to extend the probation period, as it did, it could only terminate the Claimant's contract on two weeks' notice during the initial three months of his probationary period. He says, the second sentence clearly states: (***my emphasis***) "***During the three (3) month probationary period****, we reserve the right to terminate employment at any time..*" and the following sentence "*Termination of employment will be given with a two (2) week notice period*" envisages that the two weeks' notice period applies only during the initial three months of the probation period.

40. I disagree. Although far from being a masterpiece of legal drafting, in my judgment, read as a whole, clause 7.1 has the meaning that the two weeks' notice period to terminate the contract applies during the entire probationary period, whether the initial three months or any extension thereof. I find that for the following reasons.

41. The third sentence, which stipulates two weeks' notice, is a stand-alone sentence and as such shall be read in the context of the entire clause 7.1, which provides for the possibility of extending the probationary period.

42. The purpose of the probationary period clause is precisely to give the Respondent the option to terminate the Claimant's employment on a shorter notice than three months' notice under clause 17.1. There appear to be no other contractual differences with respect to salary, benefits or working conditions during and after the probationary period. Therefore, if the Respondent were only entitled to terminate the Claimant's employment on two weeks' notice during the initial three months, the provisions, which allow the Respondent to extend the probationary period beyond the initial three months would seem to be devote of any practical effect. That, in my judgment, could not have been the parties' intention at the time the contract was executed.

43. Finally, while I accept that although the second sentence does not have the word "***initial***" (as "*During the* ***initial*** *three (3) months…*) the "*the*" in "*the three (3) months*" should be read as referring to "*three (3) months from the date of joining the Company*" in the preceding sentence. Nevertheless, the second sentence, when read as a whole, simply states the Respondent can terminate the Claimant's employment at any time during the initial three months "*without obligation to pay out the remainder of the three (3) months.*" In other words, this provision tells the Claimant that being on probation for the first three months of his employment does not guarantee him employment or salary for at least three months. That, in my judgment, is a different matter to how much notice he is entitled to during his probationary period, which is dealt with in the third sentence.

44. For the sake of completeness, I wish to add a further observation on construction of the notice provisions. Mr Stephenson did not argue that clause 1.1 of the contract should be interpreted as allowing the Respondent to terminate the Claimant's contract only in accordance with clause 17.1 ("*Your employment with the Company …. will continue until terminated in accordance with the section entitled "Termination of Employment" below*"), that is on three months' notice, irrespective of whether the Claimant was on probation or not.

45. While I can see that on the strict reading of clause 1.1 such argument could have been run, reading the contract as a whole, in my judgment, that provision should be read as subject to clause 7.1, namely that during the Claimant's probationary period his employment can be terminated on two weeks' notice.

Should a term be implied to the effect that the Respondent is not entitled to extend the probationary period "without reasonable justification"?

46. Mr Stephenson submits that "*insofar as, clause 7.1 permitted [the Respondent] to terminate [the Claimant's] contract on two weeks' notice, [the Claimant] maintains that the tasks set were excessive, and [the Respondent] unreasonably exercised its discretion to extend his probationary period and terminate his employment without reasonable justification*".

47. At the start of the hearing and again during his closing submissions Mr Stephenson confirmed to me that this argument was advanced on the basis of contractual construction of clause 7.1, and not as a claim for breach of the implied duty of trust and confidence or implied term not to treat employees "*arbitrary, capriciously or inequitably*".

48. He argued that the express terms in clause 7.1 allowing the Respondent to extend the Claimant's probation period should be read as being subject to an implied term that the Respondent can only extend the probation period beyond three months if it was "*reasonable",* and the Respondent had "*reasonable justification"* for extending the probation period.

49. I see no legal basis for implying such a term, and Mr Stephenson did not refer me to any legal authority in support of his argument. On the contrary, applying the principles articulated in *Marks & Spencer* case (see paragraph 24.d) in my judgment it would be an error of law on my part to allow such term to be implied into the contract. Therefore, I reject that such term should be implied into clause 7.1

50. For the sake of completeness, even if the Claimant's case were advanced as a breach of the implied duty of trust and confidence, taking it at its highest, that is the Respondent extending the Claimant's probationary period due to the Claimant failing to complete the task of reconciling the revenue accounting within the three months' period, where on the Claimant's view that was because

him having too much work and that him not completing the task within three months had no adverse consequences, in my judgment, it still falls well below the threshold of "*Wednesbury unreasonable*" exercise of discretionary power (see *IBM United Kingdom Holdings Ltd and anor v Dalgleish and ors 2018 ICR 1681, CA*).

51. In any event, Mr Stephenson did not argue the Claimant's case on that basis, nor did he refer me to any authority for the proposition that a term not to treat employees "*arbitrary, capriciously or inequitably*" implied by the courts in relation to employers' exercise of discretionary powers in awarding pay increases or bonus (see *FC Gardner Ltd v Beresford 1978 IRLR 63, EAT*) should equally apply to employers' express right to extend their employees' probation period.

Computing relevant dates

52. At the start of the hearing, I discussed with the parties how the relevant period should be computed, as there was some confusion with the dates. It was accepted by the parties that if the Claimant's probationary period commenced on 26 June 2020, its expiry date would be 26 September 2020 and if it commenced on 29 June 2020, the expiry date would be 29 September 2020.

53. That must be correct, as clause 7.1 reads: (***my emphasis***) "***from*** *the date of joining the Company*" and therefore applying the "corresponding date" rule (see *Dodds v Walker 1981 1 WLR 1027, HL*), the relevant period will expire on the corresponding date in that month.

54. Therefore, based on my construction of clause 7.1, I find that the Claimant's probationary period commenced on 29 June 2020 ("*the date of joining the Company*"). The initial three months period expired on 29 September 2020.

55. The Respondent extended the Claimant's probationary period in writing on 29 September 2020, before the expiry of the initial three months' period of his probation. Therefore, the extension of the Claimant's probationary was done in accordance with clause 7.1, and the Respondent was not in breach of contract by extending the Claimant's probationary period.

56. The fact that in the extension letter and the covering email of 29 September 2020 the Respondent wrote that the probationary period had been extended for a further three months' period but stated the end date of 25 December 2020 as opposed to 29 December 2020, in my judgment, is irrelevant for the purposes of determining whether the Respondent was within its rights to extend the Claimant's probation on 29 September 2020.

57. It follows that when the Respondent terminated the Claimant's contract on 16 November 2020, the Claimant was still on probation and was only entitled to receive two weeks' notice of the termination. The Respondent terminated the Claimant's contract by giving him two weeks' notice and therefore was not in breach of contract.

Variation of Contract

58. Finally, if I am wrong on construing "*the date of joining the Company*" as the date when the Claimant actually commenced working for the Respondent, i.e. 29 June 2020, and it should be construed as meaning the same date as stated in clause 1.1, I find that the date of 26 June 2020 stipulated in clause 1.1 was varied to 29 June 2020, because that was the actual date when the Claimant's employment commenced with the Respondent.

59. The fact that the Claimant's written contract was not amended to change the date in clause 1.1, in my judgment, does not mean that there was no valid variation of his employment commencement date.

60. The Claimant accepted in his evidence that he was told to start on Monday, 29 June 2020. He accepted on cross-examination that he had not raised any objection to the change to his start date. He did not start working for the Respondent until 29 June 2020. He was paid only from 29 June 2020. He saw internal announcements stating that he joined the Respondent on 29 June 2020. Until starting these proceedings in December 2020 he never raised any issues with his start date being 29 June 2020. He also did not raise any objection to the Respondent extending his probation on 29 September 2020, which on his case would have been out of time.

61. For all intents and purposes, he was treated by the Respondent as having commenced his employment with the Respondent on 29 June 2020 and he never objected to that.

62. The fact that the Claimant might not have noticed that he had been paid from 29 June 2020 or that during his telephone conversation with Mr Ali no specific reference was made to amending clause 1.1 of his contract, in my judgment, cannot be taken as showing that he had not agreed to change his start date to 29 June 2020.

63. In my judgment, the Claimant's conduct cannot be reasonably explained other than by his acceptance that his employment with the Respondent commenced on 29 June 2020.

64. Therefore, I find that he either expressly verbally agreed to vary his employment commencement date during the telephone conversation with Mr Ali or such agreement must be implied from his conduct, namely the Claimant presenting himself for work on 29 June 2020 and thereafter treating that date as the commencement date of his employment.

65. I do not accept Mr Stephenson submission that the Claimant not raising any objection when his probationary period was extended by the Respondent because he was a senior executive and because he did not wish to create further problems for himself, should be taken as any agreement resulting from such conduct not being valid.

66. To the extent clause 1.1 of his contract had to be varied for the Respondent to validly extend the Claimant's probation on 29 September 2020 (and on my primary findings that was not necessary), it was the Claimant's choice whether to accept the variation or not, and the fact that his acceptance was motivated by him not wishing to invite further trouble for himself does not mean that it was not freely given.

67. Finally, Mr Stephenson says that the Respondent did not plead in its Grounds of Resistance that there had been a variation of the Claimant's commencement date. I find that the reason for that is because in his Particulars of Claim the Claimant did not say that he had been told to start on 29 June 2020 instead of 26 June 2020. On the contrary, he states that his employment commenced on

26 June 2020. The Respondent's Grounds or Resistance are clear that the date of 26 June 2020 as the Claimant's start date was not accepted by the Respondent and the correct start date was 29 June 2020.

68. The fact that the Claimant accepts that there was a telephone conversation with Mr Ali in which he was told to start on 29 June 2020, but disputes that this had the effect of changing his employment commencement date, only became apparent from his witness statement, which he had delayed exchanging with the Respondent until the day before the hearing. Therefore, having raised that issue in his evidence for the first time, the Claimant cannot then rely on the technicality of the Respondent's submission on that issue not being specifically pleaded in the Respondent's ET3.

Overall Conclusion

69. For these reasons, I find that the Respondent was not in breach of contract by dismissing the Claimant on two weeks' notice. It follows that the Claimant's claim for breach of contract fails and is dismissed.

Employment Judge P Klimov
10 May 2021

Sent to the parties on:

10/05/21

For the Tribunals Office

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