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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4104565/2020

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Final Hearing held remotely on 19 April 2021

Employment Judge: R Sorrell

15

Mr George Mitchell

**Claimant
In Person**

20

Gerco-Fas Limited

**Respondent
Represented by:
A Sneddon
Solicitor**

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FINAL HEARING

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Tribunal is that the claim for breach of contract is not well founded and is dismissed.

REASONS

Introduction

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- 1 The Claimant lodged a claim for breach of contract in respect to notice pay on 23 August 2020.
- 2 The burden of proof is on the Claimant and the standard of proof is on the balance of probabilities.

E.T. Z4 (WR)

3 This Hearing was scheduled to determine the claim. It took place remotely
given the implications of the COVID-19 pandemic. It was a virtual hearing held
by way of the Cloud Video Platform.

4 As the Claimant was a party litigant, I explained the purpose and procedure
5 for the Hearing and that I was required to adhere to the Overriding Objective
of dealing with cases justly and fairly and to ensure that parties were on an
equal footing.

5 A joint bundle of productions had been lodged by the Respondent prior to the
Hearing and the Claimant confirmed that the Respondent had provided him
10 with a copy of it. At the outset of the Hearing the productions were checked
with parties and two further productions were lodged by parties which were
incorporated into the joint bundle and paginated. The Claimant lodged a
further production during the course of the Hearing which has also been
incorporated into the joint bundle and paginated. The importance of referring
15 to the relevant documents when giving their evidence was explained to
parties.

6 The Claimant and Mr Michael Anderson, Managing Director of the
Respondent company, both gave evidence.

Findings in Fact

20 The following facts are found to be proven or admitted;

7 The Claimant's date of birth is 12 February 1962.

8 The Respondent's business is a specialist sub-contractor which has active
sites in UK and Europe and primarily undertakes passive fire wall protection.

9 Mr Anderson was the Managing Director of the Respondent business and had
25 overall operational management of it.

10 The Claimant commenced employment with the Respondent as a Senior
Project Manager on 10 February 2020. (D5 p.20) This involved creating fire
walls and fire stopping in data. He was based in Denmark and looked after

four different sites in Europe. He was paid a salary of £80,000 gross per annum.

11 The Claimant was recruited for the role by an agency, Contract Scotland. He
was interviewed by Mr Anderson on two separate occasions in November
5 2019.

12 On 16 December 2019, Fiona Lynn of Contract Scotland emailed the Claimant
and attached his Letter of Appointment and the Terms and Conditions of his
Employment. The email stated:-

“Hi George,

10 *Good to speak to you there. Following on from our conversation please find
attached the amended paperwork, relating to the points we spoke about. Start
date to be changed to 10 February 2020 – if this can be negotiated to earlier
when you hand in your notice. In addition to your salary you will be paid £300
per month subsistence for staying away from home/meals – a tax free benefit.
15 Holidays will stay at 21 days plus 8 stats – stated in your contract that this will
be reviewed in 6 months.*

*If you can please sign the paperwork and email to me that would be
appreciated. There is space for signing the Letter of Appointment, but could
you also sign and date the final page of the Ts & Cs, just under Michael’s
20 signature.*

If you have any questions then let me please know.

Many Thanks Fiona” (D7 p.24)

13 The Letter of Appointment stated that the Claimant’s salary was £55,000 per
annum and that his standard hours of work were 40 hours per week. It also
25 provided details regarding his place of work, his pension and employee
benefits and his annual leave entitlement. (D13 pages 31-33)

14 On 16 December 2019 the Claimant signed the Letter of Appointment and
returned it to Contract Scotland following a verbal agreement with Mr

Anderson that although it stated he would be paid a salary of £55,000, this was for Contract Scotland's purposes and he would be paid a salary of £80,000 per annum. (D13 pages 31-33)

15 The Claimant was also provided with the Terms and Conditions of his
5 Employment. (D5 p.20) The Claimant did not sign this document as he still
had concerns about the stated annual salary figure being £55,000, when he
would be paid and the amount of annual leave entitlement. Contract Scotland
raised the issues of when the Claimant would be paid and his annual leave
with Mr Anderson, but he did not discuss these matters further with the
10 Claimant.

16 Once the Claimant commenced employment with the Respondent, he did not
raise these issues regarding the Terms and Conditions of his Employment
again.

17 The Claimant entered into a legally binding contract of employment with the
15 Respondent.

18 On 26 May 2020, during the Claimant's probationary period, Mr Anderson
called the Claimant and informed him that his employment was being
terminated and a replacement for his role was on his way to Denmark. During
this conversation, Mr Anderson asked the Claimant to stay in Denmark in
20 order to do a handover with his replacement until he was comfortable in the
role before making his way home to Scotland. In doing so, he acknowledged
that due to Covid-19 it was a difficult situation and as such if the Claimant
agreed to his request, he would be paid up until the end of June. The Claimant
agreed to Mr Anderson's request on this basis. It was not confirmed in writing
25 to the Claimant that he would be paid up until the end of June as Mr Anderson
said he was a man of his word and there was no need for that.

19 The Claimant did the handover with his replacement and flew back to
Scotland on 1 June 2020.

20 On 1 June 2020 Mr Anderson emailed the Claimant attaching the letter which
30 confirmed the termination of his employment. (D6 p.23) This letter stated:-

“Dear George,

Termination of Employment

5 *Further to our telephone conversation on Tuesday 26 May 2020 I write to confirm that we do not wish to continue your probationary period of employment and hereby terminate your contract.*

As per defined in your Contract Terms and Conditions, whilst still within your six months probationary period, the company reserves the right to terminate your contract with one week’s notice. Your last day of employment with Gerco-Fas Limited shall be Wednesday 3 June 2020.

10 *Any outstanding monies derived from your salary and holiday entitlement shall be paid in line with the payment schedule defined within your Contract of Employment, by 27 June 2020. Any offset from company expenses float/expenses claimed shall also be calculated and administered accordingly.*

15 *I would like to thank you for your efforts since joining the business in February 2020 and wish you all the best for the future.”*

Yours sincerely,

For Gerco-Fas Ltd

Michael Anderson

Managing Director” (D6 p.23)

20 21 Paragraph 3.2 of the Claimant’s Terms and Conditions of Employment stated:-

25 *“The first 6 months of your employment will be a probationary period during which your performance will be assessed. The probationary period may be extended at the Company’s discretion. During the probationary period, the full disciplinary and grievance procedure will not apply. During the probationary period, notice to terminate your employment may be given with 1 week’s notice by the Company or 1 month by yourself.” (D5 p.20)*

22 On 1 June 2020 the Claimant responded by email to Mr Anderson as follows:-

"Hi Michael,

Thanks for your email received and also the opportunity to work with Gercofas. Can you please confirm your call to me on the 26.05.20 that you said I would be paid up to the end of June. One month's pay you said. I hope this will be honoured as a man of your word and accepted by myself.

Regards,

George" (D6 p.23)

23 On 2 June 2020 Mr Anderson replied by email to the Claimant as follows:-

"George,

Thanks for your email. Upon thorough review of your contract we note the relevant notice period of one week. This is what shall be administered. Had your time on site extended said period you would have been remunerated accordingly.

Regards" (D12 pages 29-30)

24 On 2 June 2020 the Claimant responded by email to Mr Anderson as follows:-

"Michael,

Our conversation was if I stayed and handed over to John of what was a difficult situation. Staying in the same accommodation travelling in the same car and handing over a computer and phone with my personal details. Your words were you would pay me up to the end of June as you knew this was not an ideal situation. I hope you honour your word as this changes anything in the contract. It was you who changed the goalposts and I take your word as an honest man.

Regards,

George" (D12 pages 29-30)

25 On 26 June 2020 the Claimant emailed Gillian Oswald of the Respondent Company as follows:-

“Morning Gillian,

5 *Hopefully all well with you, can you please confirm my wage line for June. On my salary you have paid me for the month of June £6666.67 and taken the payment back of an adjustment of £5743.59? So paid £923.08 for June. Also do I pay national insurance on holiday pay shown on pay slip. Need clarity for solicitor I have an appointment today at 14.00pm. As previously mentioned not a road I wanted to go down but what was agreed. Out with any contract.”*

10 (D15 p.39)

26 On the same date Gillian Oswald responded by email as follows:-

15 *“Hi George, Yes sure I can clarify. Monthly salary is the payment of £6666.67 (Full month of June), as your termination date per your letter was 3rd June you have only been paid for the 3 days hence, the adjustment. This has been calculated as follows –*

£6666.67 x 12 = £80,000.04 (Annual Salary) / 52 = £1538.46 per week / 5 days you worked in a week @ £307.69 per day. So payment due 1-3 June is the £923.08, this giving me the adjustment of £5743.59.

20 *Holiday payments are accrued holidays while working for Gerco that has not been taken and are subject to tax and NI deductions.*

All payments have been made in line with your contract of employment and termination letter.

Kind Regards, Gillian” (D15 p.39)

27 On the same date the Claimant emailed Mr Anderson as follows:-

25 *“Good Morning Michael*

After receiving my wage line today I was extremely disappointed that you have not kept your word as per our telephone call 17.30pm on 26.5.20. That was to pay me in full up to the end of June 2020. Can I revert you back to my email on 02.06.20 of which you still haven't answered. You asked me to stay and do a handover to John of what was a difficult situation. Staying in the same accommodation travelling in the same car (Covid-19). Handing over a computer and telephone with all my personal details still on them. Your words were you would pay me up to the end of June as you knew this was not an ideal situation. I now ask you pay what was agreed by close of business today or you leave me no alternative but to raise an action through Scottish tribunal courts for unlawful holding of payments due. This is certainly not the action I would like to be taking but you leave me with no alternative.

Regards, George" (D9 p.26)

28 On the same date Mr Anderson replied to the Claimant as follows:-

15 "Morning George, Thank you for your email.

We have reviewed your email correspondence of 2nd June 2020 (08:29am) and fail to see a question to be answered. Apologies if that has been misinterpreted but we believe the previous emails of the same chain to be conclusive. If we could revert you to said correspondence it shall offer clarity to the first point you raise in your correspondence of this morning. Any requests made to you on behalf of the business were done so in line with your terms and conditions of employment as indeed was the termination of your probationary period. We're unsure why you would have any personal details on company property and shall thoroughly investigate any risk associated to the business. Your request is noted however we advise that our position remains as previously advised.

Regards, Michael" (D10 p.27)

29 The oral agreement to vary Clause 3.2 of the Claimant's Terms and Conditions of Employment from a one week notice period to a one month

notice period is invalid due to the 'no oral modification' clause at Paragraph 16 of the Claimant's Terms and Conditions of Employment which states:-

Changes to Terms and Conditions of Employment

5 16.1 *"The Company may amend, vary or terminate the terms and conditions in this document and any such change will be notified to you personally in writing, or when generally applied, by notice."* (D5 p.20)

30 The Claimant was paid one week's notice pay in accordance with Paragraph 3.2 of his Terms and Conditions of Employment. (D5 p.20 and D15 p.39)

Respondent's Submissions

10 31 It is submitted on behalf of the Respondent that this is a very clear case. There is a written statement of the Claimant's Terms and Conditions of Employment which were provided to him at the very start of his employment. We have heard in evidence that the Claimant did not sign those terms. However, he did sign the Letter of Appointment sent along with those terms which replicated
15 significant aspects of the contract. In addition to that the Claimant began employment and worked for a period of 15 weeks raising no issues regarding those terms with his employer. It is therefore submitted that those terms and conditions were impliedly accepted by the Claimant.

20 32 Clause 3.2 of the Terms and Conditions of Employment allows for the termination of employment during the probationary period and it makes it very clear that the notice period is one week. The Claimant was verbally given notice of the termination of his employment on 26 May 2020. This was then confirmed in writing on 1 June 2020 and his employment ended on 3 June 2020, being one week's notice. The Claimant has therefore been paid the
25 notice pay he is contractually entitled to.

33 The Claimant's position today is that he is arguing a verbal variation of his contract regarding the notice period during a telephone call on 26 May 2020. The Respondent's position is that no such variation occurred. In terms of credibility, we heard from the Respondent very openly that there was a verbal

variation in terms of the Claimant's salary which took place at the very start of his contract. It has been accepted in evidence that the Respondent kept his word in relation to that and paid a significantly higher salary than that which was recorded in writing.

5 34 It is submitted that if the discussion on 26 May 2020 had taken place in that
the Respondent had agreed to pay one month's notice pay and then
backtracked on that, it is in complete conflict with what occurred in relation to
the Claimant's salary. Either that discussion did not take place or there has
been a misunderstanding on the part of the Claimant in which there has been
10 a discussion about timing of payment or perhaps a handover exceeding the
one week's notice period. The Respondent's position is that the Claimant was
paid what he was contractually entitled to. Even if we dispense with the
contract, in terms of statutory entitlement, the Claimant would have had to
have worked four years to receive four week's notice pay, but in fact he only
15 worked fifteen weeks.

Claimant's Submissions

35 The Claimant submitted that there are no signed terms and conditions of his
employment. The Letter of Appointment is not worth anything and it does not
refer to any terms and conditions as it was only for Contract Scotland. He
20 raised issues regarding his terms and conditions with Contract Scotland, but
they never replied to him. The last contact he had with Mr Anderson was on
26 May 2020. There was no misunderstanding, it was an honest verbal
communication. He said he was a man of his word. The ET3 response to his
claim states that Mr Anderson informed him on 26 May 2020 that his
25 employment would end on 3 June 2020, but he didn't know when his
employment was going to end at that point, so he was cast adrift.

Relevant Law

Formation of a Contract

36 For a contract of employment to exist, there must be an agreement, consisting
of an offer which is then accepted, made between two or more people. The
agreement must be made with the intention of creating legal relations and be
supported by consideration i.e. something of benefit must pass from each of
5 the parties to the other. The terms of a contract must also be sufficiently
certain. Unless the acceptance of an offer of employment specifically requires
that it be communicated in a particular way, acceptance can be express (in
writing or oral) or implied by conduct. It was held in **Collymore v Capita
Business Services Ltd EAT 162/98** that as the employee did not formally
10 accept the terms of employment by letter and no counter- offer had been
accepted by the employer, the employee's conduct in turning up for work
indicated an acceptance of the original terms offered. While acceptance can
therefore be by conduct, it was held in **Arley Homes North West Ltd v
Cosgrave EAT 0019/16** that it is still necessary for the parties to intend to be
15 bound by the terms of the contract.

Breach of Contract

37 If an employee is dismissed with no notice or inadequate notice in
circumstances which do not entitle the employer to dismiss summarily, this
20 will amount to a wrongful dismissal and the employee is able to bring a breach
of contract claim to recover damages in respect of the contractual notice
period. Damages in a wrongful dismissal claim will be limited to the
employee's losses occurring during the period between the date of dismissal
and the date at which the contract could lawfully have been brought to an end
25 by the employer in accordance with the contractual notice period.

38 Section 86 of the Employment Rights Act 1996 sets out minimum periods of
notice required to terminate a contract of employment. Where notice is given
by an employer, the notice required is one week for employees who have
30 been continuously employed for at least a month, but less than two years and
one week for each year of service for employees who have been continuously
employed for two years or more up to a maximum of 12 weeks for continuous

employment of 12 years or more. If the contract provides for more notice, it is the longer notice period which prevails.

Oral Agreements

39 While express contractual terms can be oral promises as well as written
5 promises, it can be difficult to establish that an oral promise was made, the content of it and whether such words were intended to be legally binding by both parties without corroborative evidence.

40 Contracts of employment may include clauses that purport to limit the parties'
10 ability to vary the contract's terms by requiring any variations to be agreed between the parties in writing. The Supreme Court held in **Rock Advertising Ltd v MWB Business Exchange Centres Ltd 2019 AC 119, SC** that a 'no oral modification' clause in a property licence agreement was legally effective so as to render ineffective a subsequent agreement made orally to vary the
15 written terms that had been previously agreed. In his leading judgment, Lord Sumption identified a number of commercial reasons for giving effect to such clauses, in that they prevent attempts to undermine written agreements by informal means, they avoid disputes about whether a variation was intended and its exact terms and they give businesses more control over who internally
20 has authority to agree variations.

Issues to be Determined by the Tribunal

- 41 The Tribunal identified the following issues required to be determined:-
- (i) Did the Claimant enter into a legally binding contract of employment
25 with the Respondent?
 - (ii) Was an oral agreement made between the Claimant and Respondent to vary the Claimant's contractual notice period?
 - (iii) If so, was the variation effective in terms of the Claimant's Terms and Conditions of employment?

- (iv) If so, how much notice pay is the Claimant to be awarded?
- (v) If not, was the Claimant paid the correct notice pay?

Conclusion

5 42 Having carefully considered all of the evidence in the round I found the Claimant was a credible and honest witness who gave consistent and reliable evidence, whereas I found Mr Anderson to be a less reliable witness due to the inconsistencies in his evidence.

10 43 I found that the Claimant had entered into a legally binding contract of employment with the Respondent. This is because he signed the Letter of Appointment which specified the main terms of his employment and although he did not sign the Terms and Conditions of Employment document due to the issues he had raised about it, he was clear in cross examination that he did not raise these matters with the Respondent again once his employment
15 commenced. I therefore considered that in accordance with **Collymore (“supra”)**, the Claimant’s conduct in commencing employment indicated an acceptance of the Terms and Conditions of Employment and that in terms of **Arley (“supra”)**, he had intended to be bound by them.

20 44 I found that on 26 May 2020 an oral agreement to vary the Claimant’s contractual notice period from one week to one month was made between the Claimant and Mr Anderson in that the Claimant would stay in Denmark to do a handover with his replacement until he was comfortable in it before making his way home to Scotland, on the basis that the Claimant would be paid up until the end of June. This is because the Claimant’s evidence has been both
25 consistent and persistent that this was the position which was clearly corroborated by the numerous emails he sent to Mr Anderson between 1 - 26 June 2020.

30 45 In contrast, I did not find Mr Anderson’s evidence was consistent in respect to this material issue. In reaching this view, I did not consider it was evident from the Termination of Employment letter sent by Mr Anderson on 1 June 2020 to

the Claimant that the Claimant had been verbally informed on 26 May 2020 his employment would end on 3 June 2020 as asserted in the ET3 response to the ET1 claim. This was borne out in his evidence in chief when he gave clear evidence to the contrary, in that he had in fact asked the Claimant to do a handover with his replacement for as long as it took for him to be comfortable in the new role.

5

I was further satisfied that this oral agreement was supported by consideration. This is because the Respondent agreed to pay the Claimant more than his one week's contractual notice pay in return for the Claimant staying in Denmark, (which he acknowledged put the Claimant in a difficult situation due to Covid-19), in order to do a handover with his replacement until he was comfortable with his new role, which meant there was no agreed time limit on that and it may well have exceeded the one week contractual notice period.

10

However, notwithstanding the above, I found that in applying the authority of **Rock Advertising Limited ("supra")**, this oral variation was ineffective due to the 'no oral modification clause' at 16.1 of the Claimant's Terms and Conditions of Employment, which stated that any variation to the terms and conditions will be notified to the Claimant personally in writing.

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Accordingly, I am satisfied that the Respondent paid the Claimant his contractual notice payment of one week and that he is not entitled to any further notice pay.

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For all these reasons the claim for breach of contract is not well founded and is dismissed.

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Employment Judge: Rosie Sorrell
Date of Judgment: 14 May 2021
Entered in register: 17 May 2021
and copied to parties

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