EMPLOYMENT TRIBUNALS

Claimant: Miss E Pinnington

Respondent: Elegant Address South of France Ltd

Heard at: Manchester Employment Tribunal

On: 30 June 2021

Before: Employment Judge Dunlop

Representation

Claimant: In person
Respondent: Ms S Thompson (Director)

JUDGMENT

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was a video hearing, using the tribunal's Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable in the circumstances of the covid-19 pandemic and all issues could be determined in a remote hearing.

1. It is necessary in the interests of justice for my judgment dated 10 February 2021 (sent to the parties on 4 March 2021) to be reconsidered and set aside.

2. Time for presentation of the respondent's response is extended to 13 April 2020, meaning that the response presented on that date is accepted.

3. The claimant was dismissed in breach of contract in respect of notice and the respondent is ordered to pay damages to the claimant in the gross sum of **£1,603.83**, which is calculated as set out in the reasons below.

REASONS

Introduction

1. Usually, written reasons are not given for Employment Tribunal decisions unless a request is made by one of the parties. However, this case has a

complicated procedural history and I considered it may assist both parties if I gave written reasons without waiting for such a request.

2. Today's hearing was attended by Miss Pinnington and Ms Thompson. Both had prepared bundles of documents and I had regard to those as well as the more comprehensive correspondence contained on the Tribunal file. Both Miss Pinnington and Ms Thompson gave evidence on affirmation and made submissions in respect of the three matters to be decided.

Findings of Fact

3. The respondent's business is in luxury holiday rentals. Miss Pinnington commenced employment on 3 September 2018 as a consultant. It is a small business, and at the material time she was the only employee, although up to four or five people had previously been employed. From September 2019 the respondent operated out of offices in Chester ("the office"). A contract of employment was signed between the parties on 14 September 2018. It contained the following clause:

> **Period of Notice**
> **The required period of notice is one month after the probationary period. The company has the right to pay the Employee in lieu of notice for this period . Your statutory rights are not affected by this. During the probationary period notice is as set out by Government Guidelines.**

4. The respondent's business was, for obvious reasons, drastically impacted by the covid-19 pandemic. The office closed from 20 March 2020. Initially, Miss Pinnington was placed on furlough, although the respondent later decided to cancel her furlough. (This claim not concerned with that decision or the steps taken to implement it.) In any event, by late April 2020 Ms Thompson had decided to terminate Miss Pinnington's employment. She asked her accountant to calculate the termination payments due. This yielded the following calculation in an email:

> **Salary @ £25,000pa = £68.50 per day**
> **Salary due until 23"I April 2020 23 days @ £68.50 £1,575.50**
> **4.5 Holidays due until 01/05/2020 @ £68.50 £ 308.25**
> **1 Weeks redundancy notice and pay given £ 479.50 (No PAVE/NI is deducted from Redundancy pay)**
>
> **Total Salary and pay due £2 363.25**

5. There is no dispute between the parties about the salary figures that calculation is based on, the termination date, or the holiday pay. I will comment further on the "redundancy notice" payment below.

6. Miss Pinnington believed that she should have received notice (or payment in lieu of notice) for one month. She raised this with Ms Thompson directly and with ACAS but did not reach a resolution. She therefore presented a claim to the Tribunal on 4 June 2020. This was served on the respondent at its office address, with a deadline of 6 July 2020 to respond.

7. The respondent did not present a response. I find that the claim had not come to the attention of Ms Thompson. She had vacated the office in May

2020, as a result of the pandemic. She had returned the keys to the landlord and changed the company's correspondence address with its bank, phone provider and so on. She had made no general arrangements for the forwarding or collection of other mail.

8. There was subsequently correspondence between the Tribunal and Miss Pinnington in which more information was requested to enable the Tribunal to issue a Judgment on the claim under Rule 21 Employment Tribunal Rules of Procedure 2013. This included clarification of the corporate entity which had employed Miss Pinnington, as well as the calculation of the notice pay amount.

9. On 29 October 2020, the respondent's address was changed on Companies House records ("the new address"). Ms Thompson continued to run the business from home and the new address was the address of her accountants. This was not done immediately on giving up the office premises as there was some discussion around whether it would be possible to use the accountant's address and Ms Thompson was in the process of changing accountants as hers was retiring. The accountants were responsible for filing the change of address documentation. Ms Thompson believes that that may have happened when they submitted the annual return at the end of September, but she cannot be sure. I need not make a specific finding as to when the address was changed for the purposes of this judgment.

10. On 10 February 2021 I made a Rule 21 Judgment, awarding Miss Pinnington £1,918.00 notice pay. It came to my attention that the respondent's address had changed at Company's House, but also that the change of address post-dated the service of the claim by some months. On that basis, I considered it appropriate to issue the Judgment, but to direct that it be served on the new address rather than the office address.

11. Ms Thompson said (and I accept) that the judgment came to her attention as a result of an email from her accountant on 8 March 2021.

12. Subsequently, Ms Thompson made efforts to challenge the decision both by an application for reconsideration and by an appeal. She was evidently confused around the correct procedure to follow, and I need not set out the details of the correspondence around that. However, she managed to submit a proposed response on the correct form on 13 April 2021, following which this hearing was convened to deal both the respondent's applications for reconsideration and extension of time to present its response, and to deal with the substance of the claim if it was to be permitted to proceed.

Reconsideration and late acceptance – law and conclusions

13. In considering whether the set aside the judgment of 10 February 2021 and to accept the respondent's late response I have had regard to Rules 20 and 70-73 Employment Tribunal Rules of Procedure 2013 and the principles set out in the case of **Kwik Save v Swain [1997] ICR 49**. That case requires me to consider the explanation for the delay in presenting the response, the

balance of prejudice in accepting or not accepting the response out of time and the merits of the defence.

14. I consider that it is in the interests of justice to set aside the 10 February judgment, accept the late response and allow the respondent to defend the claim.

15. I accept, as a matter of fact, that Ms Thompson did not receive the claim and sought to respond promptly once she became aware of the judgment. This is not a respondent which has been aware of a claim but 'struck its head in the sand'. Ms Thompson could perhaps have done better in the arrangements made for forwarding mail and for promptly changing the respondent's address with Companies House, but that failure needs to be seen in the context of the small size of the business, and, particularly the pandemic, which has had a general impact but also a particularly severe impact on the travel industry. I am sure that for much of this period Ms Thompson has had other pressing priorities to deal with.

16. I therefore accept that the respondent has a reasonable explanation for the delay in presenting the response. Further, I consider that there is no prejudice to the claimant in allowing the claim to be defended as both parties have confirmed that they are able (and expecting) to deal with the substantive claim today. The third factor – merits of the defence – is against Ms Thompson, for reasons more fully set out below. However, in the circumstances of this case it seemed to me that it was far preferable for both parties to have a decision 'on the merits' regarding the proper interpretation of the notice pay clause in Miss Pinnington's contract, than for them both to argue their positions today and have the matter determined on a technical point.

The notice pay claim – law and conclusions

17. Under s155 Employment Rights Act an employee is not entitled to redundancy pay unless they have been continuously employed for at least 2 years. Miss Pinnington had not been employed for two years, and therefore she was not entitled to any redundancy pay, despite what was said about that in the accountant's email.

18. When an employee's contract is terminated by their employer, they will almost always be entitled to be given notice of dismissal. The only exception is if they have committed an act of gross misconduct, which has never been suggested in this case.

19. I asked Ms Thompson about her understanding, as an employer, of her obligation to give notice to an employee if she was terminating their contract. She seemed to have difficulty with the question. As far as she was concerned, it is for the employee to give notice if they want to leave to allow the employer to make arrangements to recruit a replacement or otherwise cover their work. It is concerning to the Tribunal that Ms Thompson appears to have employed a number of people over a number of years without having an understanding that notice of termination of employment is a basic employment right. In respect of the contract, she said that this was given by

the employer to the employee to inform them of their rights and obligations. The obligation to give a week's notice was therefore an obligation on the employee only. The rights were "statutory rights" and the contract did not give an employee anything more generous than their statutory entitlement in an area, including notice pay. (Although she seemed unaware that there was an statutory right to notice pay).

20. In determining the length of the notice period, there are two sources that have to be considered. Under s.86 Employment Rights Act 1996, an employee is (broadly) entitled to a week's notice for each complete year of service, up to a maximum of twelve weeks. Miss Pinnington's statutory notice entitlement under s.86 is one week.

21. Looking purely at statutory entitlement, then, the accountant's calculation provided to Ms Thompson got to the correct end result. Miss Pinnington *was not* entitled to a redundancy payment, but *was* entitled to a week's notice pay. I find that is what she got, albeit that it was confusingly described as "redundancy notice", and appears to have wrongly been paid gross instead of having tax and NI deductions made. I am satisfied that this email represented the accountant's attempt to correctly calculate and pay Ms Pinnington's statutory entitlement on termination, and that there was no intention to pay her an *ex gratia* redundancy payment, whilst withholding her notice pay.

22. Importantly, though, the statutory notice period is only a minimum. Contracts of employment may give employees longer periods of notice, and often do. The key question in this case is therefore the interpretation of the contractual notice pay clause set out above.

23. I agree with Miss Pinnington that the most obvious, and correct, interpretation of this clause is that it applies to both parties – if an employee wants to resign they are obliged to give one month's notice and if the employer wants to dismiss they are also obliged to give one month's notice. The employer might, of course, be obliged to give longer notice if an employee has more than four years' service – that is what is meant where the clause says "Your statutory rights are not affected by this".

24. I consider that Ms Thompson has misinterpreted this clause and that its clear meaning and effect is as I have described. However, even if I am wrong that the meaning cannot be described as clear, there is a rule of contractual interpretation that, if a document is ambiguous, it must be construed against the person responsible for offering those terms. Although I am sure that Ms Thompson did not personally draft these terms, the respondent is the one offering the contract to its employees (as Ms Thompson herself noted during her submissions). Therefore, to the extent that there is any ambiguity, the interpretation which is more favourable to the claimant is to be preferred. In this context, I note that it is not particularly unusual for a business to require an employee to give more notice than the business itself needs to give, but such an 'asymmetric' notice provision would have to be unambiguously set out in the contract to be effective. That it not the case here.

25. I therefore conclude that Miss Pinnington was entitled to be given one month's notice and the respondent was in breach of contract by failing to do so.

26. Having regard to everything I have said above, I calculate that the damages due in respect of the failure to give notice would be £2,083.33 (being the agreed annual salary divided by 12). However, as I have found that one week's notice at £479.50 has already been paid, the sum awarded is reduced to £1,603.83. This is a gross sum and the parties are responsible for ensuring that appropriate tax and national insurance is paid.

Employment Judge Dunlop
Date: 30 June 2021

SENT TO THE PARTIES ON

6 July 2021

FOR EMPLOYMENT TRIBUNALS

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2406172/2020**

Name of case: **Miss E Pinnington** v **Elegant Address South of France Ltd**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: 6 July 2021

"the calculation day" is: 7 July 2021

"the stipulated rate of interest" is: **8%**

Mr S Artingstall
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.