



EMPLOYMENT TRIBUNALS

Claimant: Mr S Montisci

Respondent: Innoval Technology Limited

Heard at: Leeds by CVP

On: 21 and 22 June 2021

Before: Employment Judge Maidment (sitting alone)

Representation

Claimant: In person

Respondent: Mr J Jenkins, Counsel

JUDGMENT having been sent to the parties on 25 June 2021 and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues

1. The central issue in this claim is whether the claimant was contractually entitled to 1 or 3 months' notice of termination. The claimant commenced his employment on 14 November 2018 and it was terminated (at the end of 1 month's notice served by the respondent) on 3 August 2020. The claimant maintains, however, that the respondent was entitled lawfully only to bring his employment to an end on 3 months' notice. He therefore claims a shortfall of 2 months in terms of notice pay, employer's pension contributions and the loss of a company car. He also brings a separate complaint for holidays which would have accrued during an additional 2 months' notice. He was in fact paid in respect of holidays which would have accrued during the 1 month notice period together with compensation for loss of employer's pension contributions and company car during that 1 month period. In addition, the claimant also brought a complaint seeking unpaid commission. The respondent's position is that the 2 amounts due in

respect of sales to a particular customer of £528.13 and £422.50 were indeed due to the claimant and the respondent says that it has actioned payment by sending a cheque to the claimant. The claimant has not yet received the cheque. During the course of the hearing it was confirmed on behalf of the respondent that it would consent to the tribunal's judgment containing an order by consent that the respondent pay these gross sums to the claimant, it being recognised that if the cheque was received by the claimant he could not seek any form of double recovery.

Evidence

2. The tribunal had before it an agreed bundle of documents numbering some 276 pages. Having spent time briefly identifying the issues with the parties, the tribunal privately read into relevant documents and the witness statements exchanged between the parties, so that when each witness came to give evidence, he/she could simply confirm his/her statement and then, subject to any brief supplementary questions, be open to be cross-examined on it.
3. The tribunal heard firstly from the claimant and a former colleague, David Humphreys. He also relied on a written witness statement from a former employee of the respondent, Julie Hodgkins dated 27 October 2020. Without objection the tribunal accepted such statement in evidence on the basis that only reduced weight could be given to it in circumstances where Mrs Hodgkins was not present to be cross-examined.
4. Indeed, the same applied to a separate statement of Julie Hodgkins submitted on behalf of the respondent and upon which it wished to rely. The tribunal heard on behalf of the respondent from Saiqa Elwood, HR Manager for the Danieli Group, Michael Clinch, Senior Consultant and Materials Development Group Leader, Gary Mahon, Managing Director of the respondent and Sunil Khosla, Senior Consultant.
5. Having considered all relevant evidence, the tribunal makes the following factual findings.

Facts

6. The claimant was employed by the respondent from 14 November 2018 as its Business Development Manager. This was a newly created role. He was subsequently given one month's notice of the termination of his employment effective on 3 August 2020.
7. The respondent is a subsidiary of Danieli UK Holding Limited which is in turn a subsidiary of the Danieli Group, a substantial Italian corporation involved in the manufacture of equipment for the metals processing industry. The respondent operates as a technical consultancy, mainly in the field of aluminium.

8. The claimant reported to Dr Mike Clinch, Materials Development Group Leader who in turn reported to Dr Gary Mahon, Managing Director. The respondent's Chairman is Mr Andrew Betts.
9. The claimant attended a first interview at Danieli's Banbury office on 29 September 2018 with Ms Saiqa Elwood, head of HR with Danieli UK Holding and Dr Clinch. He attended a further interview at Banbury on 15 October. There then followed two further interviews at Danieli's Rotherham office on 25 October with Ms Elwood and Mr Betts and finally on 1 November 2018 with just Ms Elwood.
10. The claimant's evidence is that on 25 October, in answer to a question he raised, he was told that his employment would be terminable on 3 months' notice. Ms Elwood's evidence is that there was no discussion or mention of notice periods and no discussion at all as regards terms and conditions, other than salary and commission structure.
11. The claimant has produced extracts from a handwritten notebook where Mr Betts himself made some notes regarding bonus structure. The notes then continue in the claimant's own handwriting to set out the level of pension contributions based on auto enrolment, the respondent's leave year, a reference to salary payment dates, the provision of a company credit card, three months' notice and a potential start date for the claimant of 5 November. This note is accepted as genuine and accurate and contains information which can only have come from the respondent and which is at odds with Ms Elwood's assertion that there was no discussion regarding terms and conditions of employment. The tribunal accepts that the claimant asked about notice periods and was told that employment would be terminable on three months' notice.
12. Notice was not subsequently discussed at the final interview on 1 November. The claimant was given an offer letter at that meeting dated 1 November 2018 which set out his remuneration package and employee benefits. The letter referred to there being a probationary period of six months which would have to be completed to a satisfactory level. The letter made no reference to periods of notice.
13. The claimant accepted this offer of employment. A slightly revised letter of offer was produced dated 2 November which provided additional terms regarding commission, but again no information regarding notice periods.
14. A start date was agreed of 14 November and the claimant attended work on day to be taken through an induction checklist by Ms Elwood and Mrs Julie Hodgkins, a member of the respondent's administrative staff who also acted as a point of contact in terms of any HR issues, which were routinely

referred by her to Ms Elwood. The claimant was on that first day provided with a written contract of employment. Whilst the claimant was not challenged on this point (his non-receipt of a written contract prior to his commencement date), Ms Elwood's evidence was that the contract had been sent to the claimant by ordinary post in advance of his commencement date. The tribunal accepts that this was never received by the claimant or indeed sent in the absence of a covering letter which the tribunal considers would have been included with such a document. There is no evidence produced by the respondent that it was ever sent to the claimant in advance.

15. The contract of employment was said to be subject to a successful completion of a six-month probationary period. However, no change to the claimant's terms and conditions of employment were triggered by the completion of his probationary period. Holiday entitlement was set at 25 working days plus statutory holidays with a holiday year running from 1 May each year. Pension benefits were set by reference to the requirements of auto enrolment. The period of notice required to terminate employment by the employer or employee was one month. The respondent reserved a discretion to make a payment in lieu of notice entitlement or any part thereof. The contract contained an acknowledgement of receipt and agreement to the terms of the Employee Handbook. That Handbook was said, however, not to form part of the contract of employment and, in the event of any conflict, the provisions of the contract would take precedence. An appendix set out further employee benefits including death in service, group income protection, the provision of a company vehicle, sales commission and employer contributions to pension at a rate of 5%.
16. The contract presented to the claimant had been signed in advance, but not dated, by two directors. The claimant signed and dated the contract on 14 November 2018.
17. The claimant's case is that this followed a discussion with Ms Elwood regarding notice entitlement. Ms Elwood contended that no such discussion took place. The written statement of Mrs Hodgkins submitted by the respondent was to the effect that she had no recollection of Ms Elwood discussing the claimant's notice period with him. The copy of the contract in the bundle of documents before the tribunal included notations in blue with an arrow and a question mark appearing next to clause 7.1 which in fact related to the period of notice required from the employee. The claimant's case was that these notations had been made prior to his signature of the contract by either himself or Ms Elwood. He could not be sure by whom. He was cross-examined on the basis that this was the version of the contract in his personnel file. The blue pen colour of the notations matches the claimant's signature on the contract. Whoever made the notations, the tribunal considers them to be indicative of their having been a discussion regarding the stated one month period of notice and that the issue was never the notice required by the employee, but that required to be given by

the respondent. The tribunal prefers the claimant's evidence to that of Ms Elwood as to there having been a discussion regarding the notice period. Having been told on 25 October that his entitlement was to 3 months, the claimant is more likely than not to have raised this as an issue, indeed as one of concern/difficulty for him.

18. The claimant's account is that when he raised his expectation that he be subject to termination on 3 months' notice, he was told by Ms Elwood that the three month notice period would apply after his completion of his probationary period and that he signed the contract based on that assurance. He signed the contract based on trust and good faith, he said, having accepted Ms Elwood's statement that the notice period would change on successful completion of the probationary period. As already stated, Ms Elwood denied that there had been any discussion at all regarding notice entitlement.
19. The tribunal notes that there was no annotation made to the contract to refer to any increase in notice period. The tribunal notes that an induction checklist was also completed by Ms Elwood which referred to the claimant having been provided with both a contract of employment and Handbook. No notation was made by Ms Elwood against the line referring to the contract of employment. In contrast, she had, for instance, made a note regarding the need to include the claimant's spouse in the company vehicle insurance and a change in payday to the 24th of each month. Again, the claimant signed off the checklist dated 14 November 2018.
20. There is evidence that the subsequent change in pay date was communicated in writing to the claimant as was his being furloughed in March 2020, albeit that was a clear requirement of the furlough scheme.
21. The claimant did, however, subsequently chase up a lack of confirmation that he had successfully completed his probationary period. He approached Julie Hodgkins around mid-May 2019 and asked what would happen once his probation period was over. He said that she mentioned that he would automatically receive a letter confirming completion of the probation period. He said that he mentioned to her that the reason he was asking was due to his concerns over the notice period and that he was expecting this to be adjusted from 1 to 3 months. He said that she agreed to contact Ms Elwood to remind her that this was still outstanding. The claimant's evidence is accepted on this point, as corroborated by the statement provided to the claimant by Mrs Hodgkin's dated 27 October 2020, where she said that she had been asked by the claimant to chase up a letter confirming the end of his probationary period and that the claimant had commented that this would change his notice period from 1 to 3 months. She went on that she had had no involvement with contract negotiations with staff herself and therefore could not comment on whether the notice period would change.

Nevertheless, the claimant's raising of this issue causes the tribunal to again prefer his evidence to that of Ms Elwood who did not accept that there had been any discussion whatsoever on 14 November regarding notice periods.

22. Mrs Hodgkin's clearly intended to ask Ms Elwood to arrange for a letter to be issued about the end of the probation period but on 22 May 2019, in error, emailed the claimant himself with this request, the claimant considering that he had simply been copied in on her email to Ms Elwood. The claimant subsequently chased Mrs Hodgkins for the letter of confirmation. Mrs Hodgkins emailed Ms Elwood on 24 July 2019 saying that the claimant had just mentioned that he had not received the letter. Ms Elwood replied apologising that this had been missed, saying that she would contact Dr Clinch to confirm that everything was okay and that there were no issues.
23. That conversation duly took place with Dr Clinch confirming that he had no issues with the claimant's performance which would adversely affect the completion of his probationary period. The tribunal accepts that there was no discussion between Ms Elwood and Dr Clinch regarding notice periods.
24. Ms Elwood emailed the claimant on 26 July stating that she would provide his probationary completion letter the following Monday and that, if he was not in the office, she would email this to him. Ms Elwood's account is that she gave the letter to the claimant by hand, although she could not be certain as to the exact date. The claimant denied that this had occurred and said that he had never received the letter. He had been on leave on the Monday and thereafter there had been no email attaching the letter. The tribunal has seen a letter of 29 July 2019 addressed to the claimant and signed by Ms Elwood stating: "I'm pleased to confirm that your probation period has ended and the normal Terms and Conditions within your employment contract now apply. We are very happy with the level of quality of your work during this period." The tribunal considers the letter to have been genuinely created as at that date. The tribunal, however, on balance accepts that this was not received by the claimant. The tribunal is further aided by Ms Elwood's position at the subsequent redundancy consultation meeting described below. Had it been, the tribunal considers that the claimant would in all likelihood have queried the lack of reference within it to a change in notice period this being the reason why he was particularly keen for his probationary period to be confirmed as having ended. Whilst the claimant did not thereafter chase the production of this letter this does not fatally undermine his account including in circumstances where he had received an email where he was told that he would be provided with confirmation of completion of the probationary period.

25. Ms Elwood could not explain why her letter referred to normal terms of employment now applying when she was of the view that the completion of probation resulted in no contractual changes. She had come across situations where notice periods had changed in the wider Danieli group, but not in the respondent.
26. The issue of the claimant's entitlement arose at a third consultation meeting in respect of his proposed redundancy which took place with Ms Elwood and Dr Clinch on 2 July 2020. The tribunal notes from the minutes, in fact prepared by the claimant and his colleague Mr Humphreys who accompanied him, that he expressed surprise at the notice period with reference to which his termination payments were being calculated, expressing his understanding that after the probation his notice period would be 3 months. Ms Elwood referred to the contract providing for a notice period of 1 month with nothing to suggest that this would change. The claimant said that at the interview stage the notice period was stated to be 3 months, that he did not see the contract until after he had started employment and that he had challenged this on signing saying that he was advised that it would be updated after the completion of his six-month probation. Ms Elwood is recorded as saying that the procedure was that the person responsible for the hiring, in this case, Dr Mahon and Dr Clinch, would have advised of the applicable notice period. She would then be advised whether probation had been successfully completed and whether the notice period needed to be updated. She was not told to amend the claimant's notice period. She said that the respondent's standard period of notice was 1 month. The claimant is recorded as confirming again his understanding as to what he had been advised when the contract was presented to him. He then raised the issue of the probationary completion letter saying that he had never received the letter. Ms Elwood is not recorded as referring to any letter being handed to the claimant but instead there is a reference to her being unable to provide an explanation as to why no letter had been provided. Thereafter Ms Elwood was recorded as saying that regardless of receiving a letter, not hearing anything should have implied that the probation was completed successfully, saying she recalled letting the claimant know verbally that he had completed his probation and promising to send a letter. Again, there was no reference to the letter being handed to the claimant.
27. The exchange at the consultation meeting is again corroborative of the claimant's account of the discussions on 14 November 2018 when he was first given the contract of employment and him being told that his notice period would increase to three months. The tribunal believes that the claimant was raising his genuine understanding and that his evidence is again to be preferred to that of Ms Elwood.
28. The tribunal has heard various evidence regarding the terms of staff handbooks. Ms Elwood's evidence was that after the acquisition of the

respondent by the Danieli group, the respondent's own handbook had been superseded by the Danieli group handbook. In reality, however, it is clear from the evidence that this had not occurred and whilst employees more latterly, including in the case of the claimant, had been provided with a Danielli group handbook, there still remained on the intranet the respondent's handbook and other documents which had continued to be updated certainly up to 2016 when there were pension changes. The reality appears to the tribunal to be that whilst the respondent had been part of a wider group, it had continued to apply local practices including in negotiating salaries and notice periods. After Ms Elwood had joined the Danieli group in March 2018 there was a process of harmonisation of terms and conditions and employment practices. However, this was a gradual and ongoing process, the claimant falling rather in the middle of it. Ms Elwood was not necessarily aware of what was still made publicly available to the respondent's staff. This did include the respondent's "old" Handbook which included a page updated in August 2015 addressing notice periods. This provided that notice would be in accordance with statutory entitlement subject to a minimum of three months unless otherwise stated in the contract of employment. It went on to say that the respondent would treat these as minimum requirements and give as long a period of notice as was reasonably practicable.

29. Indeed, up to and beyond the claimant's appointment employees had been engaged on varying periods of notice depending on their seniority and any particular negotiation or requirement to entice a new employee.
30. The claimant's role, whilst a new one, was a senior sales position.
31. Around the time of the claimant's appointment there was a live discussion and consideration of standardising notice periods at one month unless there were exceptional circumstances. After the claimant's appointment, Mr Khosla had been offered 3 months in recognition that he was being required to relocate from Holland/Germany. Other new recruits however had been made subject to one month's notice.

Applicable law

32. This case involves a determination of what was expressly agreed between the claimant and the respondent. The tribunal must determine on the balance of probabilities, in particular, what was said between the claimant and Ms Elwood. This is in circumstances of a fundamental disagreement between them as to what indeed was said.
33. The tribunal has not been asked to imply contractual terms. This is not a case where either party maintains that there was no agreement as to contractual notice and therefore were the tribunal would have to determine what an objectively "reasonable" period of notice would have been in all of the circumstances. Neither party's case is reliant upon nor can it be based

upon the terms of any Handbook, which in any event would be superseded by an express agreement between the parties to the contrary. It is accepted on behalf of the respondent that the agreement reached between the parties might involve a written agreement together with or varied by an oral agreement at the time the contract was entered into.

34. If the claimant's contract of employment was terminated only on 1 month's notice when it could only lawfully have been terminated on three, then he has a claim in damages. That involves an assessment on the claimant's actual losses in circumstances where there is a duty upon him to take reasonable steps to mitigate his loss and where he must account for any income from an alternative source received in mitigation.
35. Compensating an employee for loss of holidays which would have been accrued during a period of notice would represent a double recovery in circumstances where, if the employee had worked during the period of notice, he or she could either have taken the paid leave or indeed been required by the employer to take leave, not least under the terms of the Working Time Regulations 1998.

Conclusions

36. The outcome of this claim flows inevitably from the tribunal's factual findings and in particular that there was a contractual agreement that the claimant commenced employment subject to one month's notice increasing to 3 months after the successful completion of his probationary period.
37. That factual finding is reached on the balance of probabilities recognising that the claimant has a burden of proving that this was more likely than not what he agreed with Ms Elwood.
38. Such determinations are often not straightforward and it is fair to say that the claimant has only just surmounted the evidential hurdle. The respondent has pointed to the only written contractual document referring to a period of notice of 1 month. The tribunal recognises and has weighed up in its deliberations the lack of any written recording of the agreement the claimant says was reached in circumstances where other variations have been recorded and where one would expect it to be recorded.
39. Much of the claimant's case before the tribunal has rested on inferences he has asked the tribunal to draw from the respondent's handbook, the fact that other employees were subject to three months' notice and the fact that he possessed, what he termed to be, a key role. Such submissions have not influenced the tribunal.
40. The claimant's account of events is, however, evidence and crucial evidence which ultimately has been preferred to that of Ms Elwood. The

claimant presented as a very straightforward and genuine witness, certainly not as someone who was seeking to invent a case for monetary advantage or out of any ill will. The tribunal prefers the claimant's evidence without any conclusion that Ms Elwood has been dishonest or invented evidence. Notice periods are not terms of employment which are necessarily at the forefront of anyone's mind whilst employment subsists save perhaps when lengthy periods of notice are negotiated in the case of senior executives. Nevertheless, the claimant was in this case genuinely concerned about his notice term in circumstances where he was given a contract which did not reflect what he had been told at an earlier meeting. Inevitably, as the employee directly affected, the provenance he gave to such matter is likely to have been much greater than that given to it by Ms Elwood in circumstances where she was dealing with a substantial number of employees and their individual concerns. Furthermore, Ms Elwood was relatively new to the business - certainly to the respondent - and the claimant's appointment fell within a process of harmonisation which clearly was not completed until sometime after the claimant's departure.

41. The termination then of the claimant's contract of employment on 1 month's notice was therefore in breach of contract - his claim for damages succeeds.
42. After going through the claimant's schedule of loss, the tribunal adjourned briefly to allow instructions to be taken from the respondent as to its agreement to the figures submitted by the claimant. The sums claimed by him in respect of loss of car, employer's pension contributions and his earnings in mitigation, on production of a payslip to the respondent's solicitors, were ultimately not disputed.
43. The claimant had received a payment in respect of one month's notice. The gross value of a further 2 months' payment in lieu of notice was £8491.66. From that fell to be deducted the amount the claimant had earned from temporary employment at an Amazon warehouse during what would have been his extended notice – an amount of £1753.53. That left a sum in damages of £6738.13 to which was to be added the agreed sums of £1000 for a further two months' compensation for loss of car and the value of employer's pension contributions again agreed at the sum of £424.58. This left a gross sum payable to the claimant of £8162.71.
44. For the reasons set out in the applicable legal principles, the tribunal declined to make any order in respect of holiday entitlement which would have accrued during an extended notice period.
45. Further, the claimant at the end of the hearing made an application for a preparation time order. The tribunal explained that such an order could be made if the respondent acted unreasonably in defending the proceedings or if its defence had no reasonable prospect of success. Whilst the tribunal

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had preferred the claimant's account to that from the respondent, there was no finding that the respondent had not been honest in the position it took in these proceedings. Further, the claimant had only just managed to discharge the necessary burden of proof. No order was therefore appropriate to be made in this case.

Employment Judge Maidment

Date 5 July 2021

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