



# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE K ANDREWS

**BETWEEN:**

Mr A P C Foucher

Claimant

and

Terra Firma Capital Partners Limited

Respondent

**ON:** 21 September 2021 and  
1 November 2021 in chambers

**Appearances:**

**For the Claimant:** In person

**For the Respondent:** Mr R Cohen, Counsel

## **RESERVED JUDGMENT**

The claimant is not entitled to payment of a bonus in the sum of £31,500. The claim fails and is dismissed.

### **REASONS**

1. In this matter the claimant says that he is owed a bonus of £31,500 by the respondent. Unfortunately there have been many delays in this matter coming to Hearing for a variety of reasons including numerous postponements and the parties attending the Tribunal to inspect the original of a disputed document.
2. This Hearing effectively started at 10.45am after I had completed my pre-reading. The evidence did not conclude until 5.45pm. The evidence of three people on a relatively discrete point would not normally take that long. The claimant gave lengthy and not always completely clear answers to questions put to him. He had

to be reminded more than once not to talk over both Mr Cohen and myself. The claimant was also very thorough in his cross examination of the respondent's witnesses. As the claimant is a litigant in person and English is not his first language – although he is completely fluent – I did not want to cut him short and risk him not having been able to put forward the points that he wished.

3. The claimant is now resident in France and given that, exceptionally and with both parties' agreement, I ordered written submissions to be filed rather than adjourning to hear them in person.

### **Evidence & Submissions**

4. I heard from the claimant and for the respondent heard from:
  - a. Mr Ahuja, CEO but formerly Group Chief Financial Officer & Chief Operating Officer (an FCA authorised role); and
  - b. Ms Sidoli, Human Resources Manager.
5. Ms Sidoli – who joined the respondent on 9 March 2019 - had prepared three witness statements. The claimant was unhappy in particular that her third statement should be accepted but having sought to understand his reason for objecting, which was not clear, I accepted it as it contains evidence relevant to the issues.
6. There was an agreed bundle of documents and written submissions were received from both parties.

### **Relevant Law**

7. Pursuant to the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 the Tribunal has jurisdiction to consider claims of breach of a contract of employment (e.g. unpaid notice/bonus) where that claim arises or is outstanding on termination of the employee's employment. Such claims are determined by reference to usual principles of contract law.

### **Findings of Fact**

8. Having assessed all the evidence, both oral and written, and the submissions made by the parties I find on the balance of probabilities the following to be the relevant facts. In making these findings I am not concluding that any individual has been dishonest or sought to mislead the Tribunal.
9. The claimant commenced employment with the respondent on 25 January 2018 as an Associate having received a conditional offer of employment on 18 December 2017 which enclosed the proposed contractual terms. Those terms provided that notice of termination by either party was required to be in writing and also gave the respondent the right to put the claimant on garden leave during any notice period. In a separate letter also dated 18 December 2017 the circumstances in which the respondent would pay a fundraising bonus and the amount of such bonus were set out. That letter said:

'The Company will pay you a cash fundraising bonus ('Fundraising Bonus'), provided you remain employed by the Company, and you are not under notice of termination given by the Company or by you where you have resigned, as at 31 March 2019...'

The parties agreed that if the bonus was payable it would be in the sum of £31,500.

10. In his submissions Mr Cohen argued that there was no requirement for notice to be in any particular form. I disagree. Given that the bonus letter was sent on the same day as the proposed terms of employment which provided for notice of termination to be in writing, I find that a proper construction of the bonus letter is that any reference therein to notice is also to written notice.
11. The dispute between the parties is that the respondent says the claimant was given written and oral notice of termination of his employment on 25 January 2019 and that therefore the bonus was not payable as he was under notice as at 31 March 2019. The claimant says he was not given such notice and therefore the bonus was payable. In order to decide which of these positions is, on the balance of probabilities, correct it is necessary to consider all the surrounding circumstances together with subsequent correspondence between the parties.
12. The respondent is a small business by number of employees (circa 50 at the relevant time) but manages very large sums of money. The claimant worked in the Support Capital team of three: himself, Mr Darras (Associate Director) and Mr Elliott (Managing Director).
13. The decision was made to wind up that team and consecutive meetings were held with each team member on 25 January 2019. Those meetings were led by Mr Geczy, the then CEO, with Mr Ahuja present. Mr Elliott was seen first then Mr Darras and then the claimant. Mr Elliott was also present at the meeting with the claimant.
14. Mr Ahuja's evidence was that an HR Manager (either Ms Andersson or Ms Vadgama) was also present at each meeting and the individuals were clearly told that they were being made redundant but that during their notice period searches for suitable alternative employment would be made. He said that after the meetings the individuals were given letters of termination by the HR manager but he was not present then and did not see the letters.
15. The respondent has provided copies of the letters it says were given to Mr Elliott and Mr Darras which expressly give three months' notice of termination by reason of redundancy. Neither are signed but I have also been provided with screenshots of the file description from each of the relevant electronic employee files on the respondent's computer system showing when each letter was last modified as a word document. In both cases that was on 25 January 2019 at about 9.50am. (The claimant has argued that the naming of the relevant sub-drive as 'potential' redundancy is significant. I do not agree.) I conclude that these letters were issued to Mr Elliott and Mr Darras on 25 January 2019.
16. Ms Sidoli's evidence was that she has fully searched the respondent's HR files – both electronic and physical – as well as searching emails with the help of the Head of IT but has been unable to find any version of the letter (whether word or pdf) that

the respondent says was given to the claimant at that meeting. The respondent says that as letters were issued to Mr Elliott and Mr Darras, it is logical to deduce that one was given to him also. She does not recall any discussion about this in her briefing when she took over from Ms Vadgama who left the respondent at the end of March 2019. No corresponding copy of the contents of the claimant's electronic employee file has been produced.

17. The claimant's evidence regarding the meeting on 25 January 2019 was that he attended a meeting on that date with Mr Geczy, Mr Ahuja and Mr Elliott but nobody from HR was present. Further he says that the meeting was held in a very small room that could not have accommodated that many people (Mr Ahuja disagreed and said the room, although small, can hold five people). He says that he was informed of the decision to stop external fundraising for the support capital strategy but also that he was a valuable employee who could contribute to the private equity strategy. He says that he was not told in that meeting that he was being made redundant and that no letter or any other document was given to him during or after the meeting.
18. On 28 January 2019 the claimant emailed Mr Geczy. He did not expressly refer to having been dismissed or made redundant in that email. He did however refer to:
  - a. the decision to abandon the support capital effort;
  - b. what he saw as an unreasonable expectation for him to simultaneously work on the recovery of the Cleor situation, explore a transition to private equity and 'potentially secure a new role externally, within a three month period'. He requested that he be given at least until the end of the year to do all of that;
  - c. it being impossible for him to find the necessary time 'to secure a new role' and that 'a short tenure' would look bad on his resume and make it difficult for him 'to secure a position externally.'
19. Mr Geczy replied by email on 30 January 2019. He also did not expressly refer to dismissal, notice or redundancy but he did refer to:
  - a. the length of time needed to assess the claimant's potential for a role in private equity and if such a role did not materialise 'the length of time needed for you to find new employment to move to'; and
  - b. 'the question of incentivisation during these periods' and that he had a proposal to discuss with the claimant.
20. The respondent says that the language in both these emails is consistent with the claimant having been given notice of termination at the meeting on 25 January 2019 and in particular that 'the question of incentivisation' only needed to be discussed precisely because the claimant was now under notice and therefore would not qualify for the bonus. The claimant disagrees and says this is simply a matter of interpretation and that the correspondence is equally consistent with his account of the meeting. As far as his own reference to the three month period is

concerned, he said that this reflected an agreement to 'catch up' in three months time.

21. In an exchange of emails between Ms Vadgama, and Mr Geczy on 19 February 2019, it appears that they had both been having discussions with the claimant. The claimant's evidence was that he never discussed these matters with Ms Vadgama and his only discussions were direct with Mr Geczy. Given that Mr Geczy expressly requested Ms Vadgama, at 12.33 on the 19<sup>th</sup> to speak to the claimant and she then replied to Mr Geczy at 15.14 setting out what the claimant had said what he understood the arrangements to be, I conclude that there was at least one discussion between the claimant and Ms Vadgama, on that day.
22. The arrangement that she set out to be the claimant's understanding was three months gardening leave to commence 22 February 2019 at full pay which was one additional month to his standard notice period and five months unpaid leave up to 1 November. The claimant agreed in his evidence that he had agreed to a period of unpaid leave with Mr Geczy prior to 31 March but that when that unpaid leave finished he understood he would return to work on full pay.
23. Ms Vadgama emailed Mr Hands, Chair of the respondent, on 25 February 2019. She referred to having issued notice on 25 January and that the claimant was being paid for three months notice until 25 April. She also referred to agreement of a further period of unpaid leave for three months and that he had requested an extension of a further 3.5 months until 31 October and that he believed being able to show that he remained employed would assist him in finding his next role more quickly. Mr Hands agreed to that proposal.
24. In an email from the claimant to Ms Vadgama on 28 February 2019 he referred to negotiating a good package with his future employer.
25. I conclude that it is more likely than not that the claimant was notified orally in the meeting on 25 January 2019 that his employment was being terminated by reason of redundancy and that termination would take effect within three months unless alternative employment was found for him. In coming to that conclusion I have taken into account the claimant's emphatic evidence that this was not the case but also Mr Ahuja's very credible evidence to the contrary and in particular the language used by both parties in the email correspondence that followed that meeting which tends to show that the claimant understood he had been given notice. That position is also consistent with Mr Elliott and Mr Darras having been given notice on the same day and the claimant himself commencing a period of garden leave from 22 February 2019.
26. I also conclude, however, that it is more likely than not that the claimant was not issued with written confirmation of that notice on that day. Again I heard emphatic evidence from the claimant that that is the case and on this occasion Mr Ahuja cannot contradict it as he did not see the letter or witness it being handed to the claimant. He, not unreasonably, expected HR to deal with the administrative side of the matter and assumed it was done. Even though I have found that letters were provided to Mr Elliott and Mr Darras the fact is that the respondent, despite extensive searches, has not been able to find any evidence of the letter being given to the claimant. Ms Sidoli accepted in her evidence that if the letter existed she

would have found it. Further, I have not had the benefit of hearing from the individual who it is alleged did give it to the claimant (indeed Mr Ahuja is not completely certain who that individual was). The respondent's best case is that it must have been given to the claimant because that is what it expected to be done and the explanation for there being no copy is that it must have been overwritten when the letters were being prepared for Mr Elliott or Mr Darras. This is not a sufficient argument to persuade me that the claimant's recollection is incorrect.

27. For clarity, I do not accept the claimant's proposition that maybe a letter was issued to him but the respondent has not disclosed it because it is unhelpful to their case. That is a very serious allegation of professional misconduct on the part of the respondent's solicitors and there is absolutely no basis other than pure speculation to make such an allegation - not least because if it did exist I would have expected the claimant to have it and to disclose it.

28. On 12 March 2019 Ms Vadgama emailed the claimant at 1825. In that email she stated that a letter was attached with regards to his arrangements. The attachment was described as 'Confirmation Letter - AF.PDF'.

29. The respondent's case is that the attachment to that email was a letter dated 9 March 2019 from Mr Geczy confirming the arrangements agreed by Ms Vadgama in their earlier email exchange. The claimant's oral evidence was that he did not remember if he received the covering email or the letter although in his written statement and later submissions he was emphatic that he did not receive or sign the letter.

30. There were two versions of the letter in the bundle. In one the opening paragraph reads:

'Further to our letter dated 25 January 2019, in which you were issued with written notice to terminate your employment 25 April 2019, I am writing on behalf of [the respondent], in which you were issued with written notice to terminate your employment 25 April 2019.'

Plainly that paragraph is poorly drafted. In the second version it more logically reads:

'Further to our letter dated 25 January 2019, in which you were issued with written notice to terminate your employment 25 April 2019, I am writing on behalf of [the respondent].'

In both versions, the letter continued:

'We have since agreed an extension to your notice period so that your employment shall terminate at midnight on 31 October 2019 (the "Termination Date").

with confirmation of unpaid leave from 26 April 2019 and that he was being placed on garden leave. It expressly confirmed that during his unpaid leave he would continue as an employee but not be required to attend for work and not receive any salary. The letter concluded at the foot of the first page with an expression of regret at having to make redundancies, thanking the claimant for his hard work and wishing him every success for the future. The signature of Mr Geczy and the space for signature by the claimant to confirm receipt appeared on the second page of the letter.

31. The terms of that letter are such that it gave notice to the claimant that his employment would terminate on 31 October 2019.
32. The respondent says that the claimant attended the office on 17 March 2019 and signed to confirm that he had read and understood the terms of the letter dated 9 March 2019. They provided the original document upon which they rely which is stapled but the claimant's signature is dated 17 March 2018. They rely upon extracts from activity logs that day that show the use of his electronic swipe ID card as he moved from one part of the office to another and that he sent the letter to print at 17.06. The claimant did not deny this but said he could not recall and found the evidence difficult to interpret. He also pointed out that in contrast to his contract of employment, the first page of this letter has not been initialled which he says he would expect given that it was varying the terms of his employment.
33. The respondent also relies upon the activity logs of Ms Vadgama to show that she opened a document called 'Letter confirming redundancy – Final' at 17.47, modified then printed it. They therefore suggest that the claimant took the letter to HR where the error in the opening paragraph was noted and corrected and then he signed it when reprinted but made a mistake when he wrote the year.
34. The claimant categorically denied that he went to HR and said that he did not remember signing anything that day although conceded he may have done but he 'definitely 100% did not sign the letter as presented' i.e. the version that shows his signature as being in 2018. He further clarified during the Hearing that he is not alleging – as the respondent had thought and were understandably very troubled by – that the 9 March 2019 letter is a forgery.
35. Ms Sidoli's evidence was that she retrieved the original of this document from the hard copy files that are kept in a locked cabinet to which she has the only key and that she has not altered it in any way. Accordingly that the two pages had been originally stapled together and remained stapled. In her second witness statement signed in March 2020 Ms Sidoli specifically stated that the original of this document shows it was signed by biro as the signature had left an impression. After that statement was prepared the claimant and the respondent's Compliance Officer and Legal Counsel, attended at the Tribunal in October 2020 to inspect the original. The claimant pointed out that there was in fact no such impression. Ms Sidoli prepared a third witness statement in November 2020 where she clarified that it was signed by gel pen. In her oral evidence she apologised and said that what she meant in her original statement was that it showed a 'wet' signature and she had not intended to mislead the Tribunal. This error on the part of Ms Sidoli, who has had the benefit of professional advice in drafting her statements and knowing that the legitimacy of this document was very much in issue, seems extraordinary. She made a very specific statement that was patently incorrect. I do not conclude that she was dishonest but I do conclude that insufficient attention was paid to ensuring that her evidence was accurate before she signed her second statement.
36. On 19 March 2019 Ms Vadgama emailed Mr Geczy saying that both the claimant and Mr Darras had signed 'their letters'.
37. I conclude that it is more likely than not that the claimant did receive a copy of the letter dated 9 March 2019 by 17 March 2019 at the latest. I reach this conclusion

based on the activity log referred to above that shows that he sent the letter to print at 17.06 and his own evidence that he did not deny printing it but could not recall if he did.

38. As to whether the claimant signed a copy to acknowledge receipt, the evidence is difficult to reconcile. None of the suggested explanations as to why there was an apparent signature by him with the correct month and day but the wrong year are particularly satisfactory. If he had been signing the letter in, say, early January it is perhaps understandable that he might have put down the previous year but this seems unlikely in March. Further, one might expect Ms Vadgama to have noticed the error. I find it even more unlikely, however, that Ms Sidoli has found and deliberately attached to the original letter a page signed by the claimant on coincidentally the same day in the previous year. Ms Sidoli struck me as an honest witness. I found her evidence as to how she found the original document already stapled to be credible and therefore also find it unlikely that she made an honest mistake by attaching an older document to the letter.
39. Whatever the explanation for the seemingly unlikely date on the second page of this letter, acknowledgement of receipt by the claimant was not necessary in order for effective notice to have been given. By receiving the letter, which I have found he did, the claimant received notice of termination. He was therefore under notice as at 31 March 2019.
40. On 18 April 2019 Mr Geczy left the respondent.
41. On 20 May 2019 the claimant emailed Mr Ahuja raising a grievance in respect of the non-payment of his fundraising bonus which he believed should have been paid to him on 25 April 2019. Ms Sidoli replied on Mr Ahuja's behalf on 21 May 2019 stating that the respondent had served notice to terminate the claimant's employment on 25 January 2019 and that although that notice had been extended to 31 October 2019 he had been under notice of termination and therefore ineligible for any bonus. The claimant did not reply to this email which is surprising if he believed its contents to be untrue. His explanation for that is that he thought it was not necessary as he knew it was not true and he started these proceedings.
42. The claimant commenced these proceedings on 24 August 2018.
43. On 9 October 2019 Mr Ahuja wrote to the claimant in a letter headed 'notice of termination of employment' again referring to having given written notice of termination on 25 January 2019 and then having extended the notice period to 31 October 2019 by the letter dated 9 March 2019. Further that the respondent had determined that they would not require his assistance on any work-related matters during the remainder of the unpaid leave and that they were therefore electing to terminate his contract of employment with immediate effect and that no payment was due in lieu of notice. The claimant accepted in his oral evidence that he received this letter and also accepted, although initially with some equivocation, that his employment came to an end on 9 October 2019. Notwithstanding that the claimant had described on his LinkedIn page in March 2020 that he remained employed by the respondent. The respondent says that this undermines the claimant's credibility as it shows he is not careful to be accurate.



44. Mr Ahuja and Ms Sidoli gave contradictory accounts of why the claimant was terminated at this point. In his oral evidence Mr Ahuja said that it was because of the receipt of this claim which was believed to be a breach of trust. In Ms Sidoli's second witness statement she said that it was because he had used his work mobile in August 2019 to download excessive mobile data when there was no sensible business reason for that usage and that in those circumstances the respondent considered the relationship with the claimant to have broken down entirely. She was unable to comment however on the claimant's suggestion that the cost of the mobile data download that she was referring to amounted to just £7.43.
45. Mr Elliott went on garden leave in about late March 2019 and left employment thereafter. Mr Darras left later in 2019/early 2020 having worked on other matters in the meantime. The fact that Mr Darras stayed in employment for a significantly longer period than that originally envisaged by his notice of termination in January 2019 is not determinative. It is not uncommon for extended periods of notice in a redundancy situation to be negotiated in order to ameliorate the effects of the redundancy on the individual.

### **Conclusions**

46. Whether the claimant is entitled to the fundraising bonus is answered by whether the respondent had put him on notice of termination of his employment by 31 March 2019.
47. Given my finding on the facts as above it follows that:
- a. The claimant was given oral, but not written, notice of termination on 25 January 2019. That was not sufficient to constitute notice according to his contractual terms of employment and bonus scheme. At that point he remained entitled to receive the fundraising bonus.
  - b. On 9 March 2019 the claimant was given written notice of termination on 31 October 2019. At that point his entitlement to the fundraising bonus disappeared as he was from that point under notice.
  - c. The claimant's employment in fact ended on 9 October 2019 when that notice was shortened by the respondent.

### **Costs**

48. The respondent has indicated that if the claimant lost his claim it wishes to apply for an order for costs against him. If they wish to pursue that a further hearing will be required in order to consider if the threshold for making such an order has been met. Although the respondent has already made some seemingly good points about the claimant's conduct of this matter, there have also been some serious inadequacies in the respondent's own paperwork and HR systems at the relevant time that contributed to the complexity of the situation. Indeed, the respondent's error in not issuing written confirmation of the notice in January 2019 was fundamental to this dispute arising and this was compounded by the uncertainty of

how the signature dated 2018 came to be attached to the 2019 letter together with the initially incorrect evidence by Ms Sidoli regarding that signature.

49. Consequently, if the respondent does wish to pursue an application for costs against the claimant they are required to confirm that in writing to the Tribunal and the claimant within 14 days of this Judgment being sent to the parties together with a time estimate and suggested directions for the necessary hearing which shall then be listed.

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Employment Judge K Andrews

Date: 4 November 2021

Judgment sent to the parties and entered in the Register on: 8 November 2021

for the Tribunal Office