EMPLOYMENT TRIBUNALS

Claimant: Mr N. Malaviya

Respondent: WAAM3D Ltd

Heard at: Cambridge Employment Tribunal (hybrid)

On: 5 May 2022

Before: Employment Judge Hutchings

Representation
Claimant: in person
Respondent: Miss N. Atwal (Solicitor)

In attendance:
At Tribunal
Mr Malaviya (claimant)
Mrs Malaviya (claimant's support)
By CVP
Dr Martina (respondent's)
Ms Emily Proverbs-Garbett (respondent's Head of Legal)
Miss N. Atwal (respondent's solicitor)
Trainee solicitor

RESERVED JUDGMENT

The claimant's complaint of breach of contract is not well founded. The respondent did not breach the claimant's contract of employment and has paid the claimant in full for the period of notice.

REASONS

Introduction

1. The claimant, Mr Naresh Malaviya, was employed by the respondent, WAAM3D Ltd as Principal Software Engineer until he was dismissed by 2 weeks' notice on 15 January 2021, his employment ending on 31 January 2021. The date the claimant started employment is in dispute; the claimant submits his employment commenced on 14 August 2020 on the basis that one of the

respondent's employees asked him to carry out some tasks, which he claims he did.

2. By a claim form dated 3 May 2021 Mr Malaviya submits several claims: that he is was owed pension monies, that his *'termination was wrongful in principle and procedurally',* that the respondent's disciplinary procedures were not properly applied and that the way he was treated was *'grossly unfair'*. Mr Malaviya further alleged the respondent had not engaged with conciliation arranged by ACAS.

3. The respondent is a provider of Additive Manufacturing equipment, consumables, software, and services. By a response form and grounds of resistance dated 10 November 2020 the respondent contends that the claimant's employment commenced on 1 September 2020, the date referred to in his employment contract. It submits that the Tribunal does not have jurisdiction to consider any claim for unfair dismissal as the claimant has less than the 2 years continuous employment at the effective date of termination. The respondent made an application for strike out of this claim on the basis the Tribunal has no jurisdiction.

4. The respondent further contends that it correctly terminated the Mr Malaviya's employment, submitting it validly extended his probation period, meaning he was only entitled to 2 weeks' notice, which it gave on 15 January 2021.

5. By an Order dated 18 October 2021 Judge Lewis limited Mr Malaviya's claims to a breach of contract claim for 3 months' notice pay, as Mr Malaviya does not have the requisite 2 years' service for a claim for unfair dismissal.

Procedure, documents, and evidence

6. The claimant represented himself and gave sworn evidence. The respondent was represented by Miss Atwal (solicitor), who called sworn evidence from Dr Filomeno Martina, the respondent's CEO, and co-founder. I considered the documents from an agreed 248-page Bundle of Documents which the parties introduced in evidence.

7. In advance of the hearing Miss Atwal had sent a written skeleton and authorities bundle to Mr Malaviya and Tribunal. At the start of the hearing Mr Malaviya handed me a copy of a 17-page statement; this was also emailed to the respondent.

8. The hearing was listed for 2 hours and sat late to hear all the evidence. There was insufficient time for closing submissions. The Tribunal invited the parties to send written submissions to the Tribunal and each other by 4pm on 19 May 2022.

Preliminary matters

9. By direction of the Tribunal the hearing had been converted to a hybrid.

10. In its grounds of resistance, the respondent was seeking a strike out of the claims relating to unfair dismissal. This application post-dated the Order of the Judge Lewis dated 18 October 2021. I asked Miss Atwal if the respondent had seen a copy of this Order. She said that neither she nor WAAM3D was aware

of it. I read the Order to all parties. The Tribunal took a short recess to allow Miss Atwal to take instructions from the respondent.

11. Miss Atwal confirmed that the respondent wanted to proceed with the hearing on the basis of the breach of contract claim only, despite not having advance notice of the Order.

12. The parties confirmed that the claim for pension monies is settled.

Issues for the Tribunal to decide

13. The Order of Judge Lewis limits the claim to breach of contract for 3 months' notice. As such, considering the dispute regarding valid extension of probationary period, the issues for consideration by the Tribunal are:

    13.1. What date did Mr Malaviya start his employment with WAAM3D?
    13.2. What is the length of notice to which the Mr Malaviya was entitled under the terms of his contract of employment? To determine this, I must consider whether WAAM3D validly extended Mr Malaviya's probationary period?
    13.3. Was the claimant given the correct amount of notice under the terms of his employment contract?
    13.4. Whether valid termination of Mr Malaviya's employment was conditional WAAM3D and Mr Malaviya entering into a consultancy agreement.
    13.5. Has the claimant been paid in full for his notice period? If not, how much is the claimant owed in notice pay.

14. Mr Malaviya's allegations regarding ACAS are not a matter for the Tribunal. The process is voluntary and the extent to which parties engage is a matter for them.

Findings of fact

15. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point.

16. The first consideration is the date on which Mr Malaviya commenced employment with WAAM3D. Mr Malaviya claims that employment started on 14 August 2020 as from this date he carried out tasks at the direction of one of the respondent's employees, Dr Ding. The respondent contends employment started on 1 September 2020.

17. Paragraph 13 of the respondent's Grounds of Resistance states:

    'The Claimant was employed under a contract of employment dated 12 August 2021'

    The reference to 2021 is a typographical error. I have a copy of the claimant's employment contract: it is dated 12 August 2020 (Tribunal emphasis) and signed by Mr Malaviya and Dr Martina. Clause 2.1 of the contract states:

    *'Your employment with the Company shall commence on 01 SEPTMEMBER 2020 ("**Commencement Date")**.*

This is a written statement of particulars of employment, required by section 1 of the Employment Rights Act 1996. It is clear on the face of this document the parties had agreed employment would start on 1 September 2020. The question is whether the respondent directed Mr Malaviya to start his employment sooner than stated in the contract. Mr Malaviya alleges it did by direction of Dr Ding. I have seen email exchanges between Dr Ding and Mr Malaviya from 14 August 2020. The emails of 14 August are arranging a time to speak to agree a start date. In emails on 17 August 2020 Dr Ding refers to ordering computer equipment and attaches job descriptions for junior employees. She also states:

'As we discussed, your official start date will be 1st September. It would be nice to have a face-to-face introduction on 21st September'

18. There are no instructions or requests to carry out tasks in this email, or in any subsequent emails before 1 September. Mr Malaviya told the Tribunal that he *'started working on this recruitment activity and other WAAM3D activities, from 14 August 2020'.* His emails to Dr Ding make suggestions and ask questions about WAAM3D but at no time is he directed to do anything by Dr Ding, or any of the respondent's employees. The claimant's contention that the 17 August email sent him *'a number of tasks I was asked to be getting on with'* is simply not accurate. There is nothing in this email asking him to do anything; it is an information email only. It is understandable that he was enthusiastic to start a new job, and conscientious in his activities, particularly given what he told the Tribunal about finding it difficult to secure a job during the pandemic. In an email dated 24 August 2020 Mr Malaviya gives his opinion on the job descriptions. He was not asked to do so, he was probably being conscientious. However, being enthusiastic to start and asking for information about his new employer / making suggestions is not the same as starting the job; such behaviour does not give rise to a legally binding contract.

19. Even if there was an instruction from the respondent (which I find there was not) Mr Malaviya would have needed to receive some consideration in exchange for the activities he undertook for employment to be effective. He did not; the claimant's pay slips show that he was paid by the respondent from 1 September 2020. In oral evidence Mr Malaviya confirmed to the Tribunal that he did not ask for any additional consideration for August. A legally binding contract is based on an exchange of consideration, usually activities for payment.

20. It is clear from Dr Ding's email of 17 August 2020 the respondent intended employment to commence on 1 September 2020; this is confirmed in the claimant's contract of employment and onboarding documentation. Indeed, in his reply of 17 August 2020 Mr Malaviya writes to Dr Ding *'Firstly, thank you for confirming the Start Date of 1 September 2020'.* I find that at the time the claimant accepted 1 September 2020 as the first day of his employment; it was only later, when relations broke down, that he sought to claim it was 14 August on the basis he reviewed the job descriptions he was sent. However, this was at his own direction, not Dr Ding's. For these reasons I find that Mr Malaviya started employment with the respondent on 1 September 2020.

21. Clause 2.1 of the employment contract provides that employment can be *'terminated by either party giving to the other 3 months' notice in writing.'* This

is subject to clause 2.2 which sets out the provisions for probation and termination during the probation period. It provides:

'The first 3 months of your employment shall be a probationary period during which time you will be entitled to give and received two weeks' notice. The Company reserves the right to extend your probationary period if circumstances so require. If your performance has been satisfactory, the probationary period will come to an end when confirmed in writing by your line manager.

22. The notice periods are clear; during any probationary period, Mr Malaviya is entitled to give or receive 2 weeks' notice; in oral evidence Mr Malaviya accepted this was the contractual provision. Once the probationary period is completed the Mr Malaviya is entitled to 3 months' notice. By clause 2.2 the respondent was contractually entitled to extend Mr Malaviya's probation period by a further 3 months. In oral evidence to the Tribunal the Mr Malaviya accepted that the contract was subject to a probationary period and that WAAM3D had the right to extend this.

23. Mr Malaviya's initial 3-month probationary period was September, October and November 2020. In November 2020 WAAM3D exercised its right under clause 2.2 to extend the claimant's probationary period by a further 3 months. This followed some concerns about Mr Malaviya's communications with colleagues. I have seen emails evidencing the respondent's concerns. It is not within the jurisdiction of this Tribunal to consider whether the issues are valid or whether they led to an extension of probation; these are matters entirely within the discretion of WAAM3D. The issue for the Tribunal is whether probation was validly extended. The respondent states the process of extension was twofold: a meeting on 30 November 2020 at which Dr Martina discussed extending probation with Mr Malaviya followed by an email at 19.22 that day confirming the extension. The email states:

'Following up from the probation review meeting we have held earlier on today, I can confirm that your probation has been extended by a period of three months.

As agreed, we will meet again next week to further discuss next steps.'

24. In oral evidence Mr Malaviya said that there was no conversation about extending probation at this meeting, alleging the discussion focused on his role. In written submissions, Mr Malaviya contends that the meeting was scheduled for a different purpose and that the email is a *'retrospective narrative'* as to what was discussed at the meeting. He asks the Tribunal to disregard the email *'as a total sham'.* I disagree. I find that the email is accurate. The substance of the meeting is key. I find that even if the meeting was not labelled as such in advance, extending Mr Malaviya's probation was discussed, and the email is a genuine reflection of this conversation. The email is contemporaneous, sent later the same day. Mr Malaviya did not challenge the email's narrative at the time. Indeed, he replies by email the following day (09.14 on 1 December 2020|), agreeing to the probation:

'As mutually agreed, while my role and responsibilities are not clear, it does make sense to extend the probation period for 3 months to allow time for both parties.'

25. This wording does not sit with the suggestion the email was the first he was aware of probation; if that had been the case he would have replied challenging the reference that probation had been discussed at the meeting. In written submissions Mr Malaviya suggests that his use of the words *'it does make sense'* do not communication acceptance. I disagree. He does not object to Dr Martina's statement that the respondent is extending probation, he says it makes sense, thereby agreeing. His reply does not raise any concerns, now raised, that the email was a sham narrative. In oral evidence and written submissions Mr Malaviya has attempted, somewhat disingenuously by suggesting a contemporaneous email he did not challenge, but accepted, is a sham narrative, to unpick what was agreed on 30 November. I find that Dr Martina discussed concerns about how Mr Malaviya's role was playing out at their meeting on 30 November and that this led to a discussion in that meeting about extending of Mr Malaviya's probation period, which Dr Martina confirmed in his subsequent email. The additional 3 months of December 2020, and January and February 2021 go unchallenged at this time.

26. On the basis that WAAM3D considered that Mr Malaviya was in a period of extended probation, Dr Martina emailed the respondent on 12 January 2020 mentioning 2 weeks' notice to terminate Mr Malaviya's employment, effective 31 January 2021. This email does not serve notice; it is an information email stating the claimant would receive any salary due and any accrued holiday pay. Mr Malaviya does not challenge this. He replies:

    'termination date of 31 Jan is fine and is accepted as per our current contractual agreement'.

27. On 15 January 2021 Dr Martina emails Mr Malaviya serving 2 weeks' notice. Mr Malaviya replies, accepting the termination date of 31 January and wishes the business the very best. The fact Mr Malaviya's reply references a termination date of 31 January 2021 is evidence that he believed himself to be subject to 2 weeks' notice at that time and that he had accepted that notice was valid.

28. Mr Malaviya submits that in emails between 7 and 12 January he agreed with Dr Martina terms for the end of his employment and that his acceptance of the notice was conditional on WAAM3D entering into a consultancy agreement with him. I disagree. I find that notice was not conditional on anything. The parties had not agreed a consultancy agreement or any contractual arrangement. This is Mr Malaviya's interpretation of the situation, as stated in his 12 January email (*'is accepted as per our current contractual arrangement'*) and a misunderstanding of the legal position. In an email dated 7 December 2020 Dr Martina made an initial proposal for a consultancy agreement between WAAM3D and Mr Malaviya. In January 2021 there are email exchanges between Dr Martina and Mr Malaviya about the possibility of WAAM3D giving Mr Malaviya a consultancy agreement; these centre on negotiation of terms and contain questions about the terms of any such agreement. The exchanges are drive by Mr Malaviya; in one he asks '*2 or 3* months'; renumeration is not discussed. I find the emails were simply exploring terms for a possible consultancy agreement. To be an agreed document the terms of the agreement would need to be clear and certain. They were not. The parties were at a stage of negotiation of a possible consultancy agreement, from which either party could withdraw at any time, which WAAM3D did; indeed, in January 2021 Dr

Martina told the Mr Malaviya that WAAM3D had decided not to continue discussion about a consultancy agreement.

29. While the email exchanges about the consultancy agreement were in the period before notice was issued, I find the notice was not issued on the basis that an consultancy agreement would be entered into between WAAM3D and Mr Malaviya. There was no conditional arrangement; the two factors were not linked. Further, under the notice terms in the contract of employment Mr Malaviya did not need to accept notice. Clause 2.5 states:

    'The Company reserves the right to terminate your employment at any time….by giving notice in writing….'

    This is a unilateral notice provision, effective (if correct amount of notice is given) when served; it does not require Mr Malaviya's consent. Nothing in the discussions about a consultancy arrangement changed this or made the effectiveness of notice conditional on a consultancy agreement. There was no agreed consultancy document, or conditional arrangement, other than in the wording put forward by Mr Malaviya in the emails, which had no legal basis.

30. I have copied of Mr Malaviya's payslips. He was paid his 2 weeks' notice pay on 29 January 2021.

Law – breach of contract: notice pay

31. The claim is for breach of contract for notice pay. Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 extends the Tribunal's jurisdiction (under the Employment Rights Act 1996) to consider monetary claims arising out of a breach of contract on termination of employment. There will be a breach if the employer fails to pay the employee the correct amount of notice.

32. For a conditional contract to be legally enforceable the offer and acceptance must be a mirror image of each other, and the terms of an agreement must be clear and certain.

Conclusions

33. Mr Malaviya's employment with WAAM3D commenced on 1 September 2021, as stated in clause 2.1 of his employment contract dated 12 August 2020 and evidenced by the onboarding records and his pay slip for September 2020. In an email dated 17 August Mr Malaviya accepted 1 September 2020 as his start date. Any activities he carried out before this date were self-directed, perhaps by enthusiasm for a new job; they were not at the respondent's direction. In written submissions the respondent's solicitors referred me to the case of *Koenig v Mind Gym Ltd UKEAT/0201/12*. In this case the EAT concluded that the action of an employee attending a meeting scheduled at the employer's request did not bring forward the start date. WAAM3D did not go this far. The emails from Dr Ding provided information only (some of which Mr Malaviya had requested), they did not ask him to do anything.

34. In determining the length of notice to which the Mr Malaviya was entitled under the terms of his contract of employment, first I address whether WAAM3D validly extended Mr Malaviya's probationary period. Mr Malaviya accepted in

oral evidence that initially his employment was subject to a 3-month probationary period. As I have found his employment started on 1 September 2020, initially he was under probation until 30 November 2020. He also accepted that, under clause 2.2 of his employment contract, the notice period during his probation period was 2 weeks and that WAAM3D were entitled to extend the probation period.

35. I have found that probation was discussed at the meeting on 30 November, and the email later that day is an accurate reflection of this. Mr Malaviya submits that as the email was sent after 5.30pm, outside his contractual working hours, so probation was not validly extended. Clause 2.2 is key: it states:

The company reserves the right to extend your probationary period if circumstances so require. If your performance has been satisfactory, the probationary period will come to an end when confirmed in writing by your line manager.'

36. Clause 2.2 does not expressly state that extension of the probationary period has to be in writing, only confirmation that it had ended needed to be in writing. However, clause 24 addresses notices, requiring that they *'shall be in writing'*: this requirement is accepted by the respondent in written submissions. Email is a valid form of written notice. Clause 24 requires service of notice within *'normal business hours'.* Clause 4.1 of the employment contract states Mr Malaviya's normal business houses as *'9.00am to 5.30pm'.* On a literal interpretation of clause 2.2 and 4.1 the email notice to extend probation is out of time. In written submissions the respondent referred me to the case of *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] UKHL 19* to submit that *'that a defect in a notice will not invalidate that notice if it was clear and unambiguous enough to leave a reasonable recipient in no reasonable doubt over how they were intended to operate'*. I conclude this is such a case. I have found extension of Mr Malaviya's probation was discussed at the meeting and this is clear on the face of the 30 November email. It is sent the same day. Mr Malaviya did not challenge the content or timing of the email at the time; indeed, he accepted the contents, replying that extension to his probationary period was *'mutually agreed'.* When notice is subsequently discussed, he does not challenge the reference to 2 weeks as incorrect as his probation was not validly extended. I conclude there was no doubt probation was being extended in fact (as a result of the discussion on 30 November) and this was accepted by Mr Malaviya in his email reply of 1 December. I conclude that by not objecting at that to the reference to probation being discussed at the meeting and replying that the extension of probation was *'mutually agreed'* stating, *'it does make sense to extend the probation period for 3 months to allow time for both parties'* Mr Malaviya had no issue at that time with the extension. Therefore, I conclude that a defect of less than 2 hours is not sufficient to invalidate the notice.

37. Mr Malaviya also suggests that as Dr Matina was not his line manager, he had *'no legal basis'* to extend Mr Malaviya's probation. His contact of employment is with the respondent company, a legal entity, not with an individual line manager. The legal basis is clause 2.2, which refers to *'the Company'* having the right to extend notice. A company is a legal person operating through its directors. Dr Martina is the CEO and therefore able to exercise the rights of the company in the employment contract of Mr Malaviya. This is as far as the contract goes. Mr Malaviya accepted in oral evidence that the contract does

not set out a procedure for probationary reviews. In written submissions he refers to the grievance policy. Extending probation is not a grievance procedure, and nor was it referred to in this context by Dr Martina. The exchanges between Dr Martina and Mr Malaviya about extending probation are professional and good natured, with Mr Malaviya expressing his view that it makes sense. Dr Martina refers to being in touch to discuss the extension when in his 30 November email. There was no grievance in consideration at this time. This was only raised for the first time by Mr Malaviya in a letter dated 27 January 2021, sent after WAAM3D had served notice to terminate his employment.

38. As I have concluded probation was validly extended for 3 months on 30 November 2020, the valid notice period to terminate Mr Malaviya's employment was 2 weeks, as stated in clause 2.2. This notice applied until 28 February 2021. Mr Malaviya was given the correct amount of notice; on 15 January 2021 he was given 2 week's written notice in an email from Dr Martina. His effective date of termination was 31 January 2021, which he had already confirmed in his email to Dr Martina on 12 January 2021 following conversations about notice, stating:

    'termination date of 31 Jan 2021 is fine and is accepted as per our current contractual agreement'

39. For notice to be effective, an employee does not need to accept it. Under the terms of the employment contract notice issued by an employer is legally effective provided it is validly served. Mr Malaviya contends that valid termination of his employment was conditional on WAAD3D and Mr Malaviya entering into an agreed consultancy agreement. Essentially, he claims that the notice provision in clause 2.2 was amended by a subsequent arrangement whereby the effectiveness of clause 2.2 was conditional on agreement between Mr Malaviya and WAAM3D that they were enter into a consultancy agreement. I have found that there was no agreed form consultancy agreement. Email discussions were at a preliminary stage of negotiations, with Mr Malaviya asking questions on 25 January, after notice had been served, about length. There was a leap of faith on the part of Mr Malaviya that the consultancy agreement was a 'done deal'; it was not. To amend a term of the employment contract so that notice was conditional there would need to be a clear promise by both parties that WAAM3D would provide Mr Malaviya with a consultancy agreement, and he would accept it. Mr Malaviya accepted in his oral that he had not received a final agreement. As the agreement was not final, WAAM3D could change its mind, which it did, citing concerns about delivery.

40. Therefore, I conclude notice was not conditional on a WAAM3D entering into a consultancy agreement with Mr Malaviya. This was something he concluded unilaterally, when he stated that the notice was *'fine and is accepted as per our current contractual agreement'.* Mr Malaviya had no legal entitlement to any consultancy agreement with the WAAM3D. The link drawn by Mr Malaviya is a misunderstanding by him of the legal position, based on the use of the word *'will* by Dr Martina in his email of 12 January 2021. This *'will'* expresses an intention to negotiate and in no way binds WAAM3D to enter into a contract with Mr Malaviya. This is Mr Malaviya's misunderstanding of how a legal contract is agreed. In any event the consultancy agreement was still at negotiation stay; the terms (length, renumeration) were not clear and certain and therefore any agreement not legally enforceable; WAAM3D had the right

to withdraw from these negotiations at any time, which it did. The terms were not agreed; evidence clearly shows that negotiations were on-going.

41. Notice is at the discretion of the employer and the terms of notice are set out at clause 2.2 of Mr Malaviya's employment contract. The terms of notice in the employment contract are clear and unconditional. This is Mr Malaviya's misunderstanding of the legal position; he could not negotiate in respect of his notice. I find that notice was 2 weeks in writing, the respondent did not need Mr Malaviya's consent to terminate his employment and notice was unconditional.

42. WAAM3D has paid Mr Malaviya 2 weeks' notice in full, evidence by his payslip dated 29 January 2021.

43. Mr Malaviya submitted a schedule of loss, which details a claim for pension (for a 3 month notice period), interest and damages for beach of contract. There is no breach of contract as WAAM3D paid the 2 weeks' notice in full, therefore there are no other losses relating to the claim for notice pay. Mr Malaviya's written submission details many alleged issues with team structure, which are not relevant to the issue of whether Mr Malaviya was paid notice in full. He also raises, for the first time, concerns about the disclosure of evidence by the respondent. The hearing bundle was agreed with evidence from both parties, The evidence which Mr Malaviya alleges was not disclosed is in the hearing bundle, having been disclosed by Mr Malaviya and accepted by the respondent in the preparation of the bundle. There is no issue with disclosure of documents; the documents Mr Malaviya complains about have been seen by the Tribunal.

44. The claim is dismissed.

Employment Judge Hutchings

24 May 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

27 May 2022

FOR EMPLOYMENT TRIBUNALS