EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Mr J Lane **v** **Hyperoptic Ltd**

Heard at: **Central London Employment Tribunal** **On: 12 July 2022**

Before: **Employment Judge Brown**

Appearances

For the Claimants: **In Person**
For the Respondent: **Mr M Greaves, Counsel**

JUDGMENT

The judgment of the Tribunal is:

1. **The Respondent did not breach the Claimant's contract of employment. The Claimant's claim for breach of contract fails.**

REASONS

The Claim and Response

1. By a claim form presented on 27 November 2019, the Claimant brought a complaint of breach of contract against the Respondent, his former employer.

2. The claim also contained complaints of unfair dismissal and failure to pay notice pay. The Claimant did not have 2 years service and the unfair dismissal complaint was struck out by EJ Spencer in a judgment promulgated on 10 February 2020.

3. The Respondent presented an ET3 Response on 23 December 2019, defending the Claimant's claim. It asserted that it had ultimately paid the Claimant's notice pay in full. The Claimant's notice pay claim was struck out by EJ Adkin on 9 July 2020.

4. The sole remaining claim to be decided at this final hearing was whether the Respondent breached the Claimant's contract by not following the disciplinary procedure set out in the Respondent's employee handbook.

5. At the start of the hearing the parties agreed that I was required to determine the following issues in the Claimant's breach of contract claim:

a. What was the claimant's notice period

b. What disciplinary process, if anything, was the claimant contractually entitled to have followed prior to being dismissed?

c. If there was a disciplinary process that the claimant was contractually entitled to have followed prior to being dismissed, did the respondent fail to provide that? If so was that a breach of contract?

d. Do the cases of Boyo v London Borough of Lambeth [1995] IRLR 50 or Gunton's [1980] IRLR 321 apply in this case on the basis that there was a period of time during which contractual disciplinary procedures should have been complied with in circumstances where that is longer than the notice pay?

6. At the start of the hearing the Respondent conceded that, if the Claimant had the contractual entitlement to the disciplinary procedure set out in its Handbook, the Respondent breached that procedure by failing to allow an appeal. However, the Respondent said that that would not have added any time to the procedure, so that the procedure would not have taken longer than the notice period.

7. The Claimant said that he alleged that the Respondent had breached the procedure in 4 ways: First, that the Respondent did not provide him with notice of allegations or evidence in advance of a hearing; second, it did not give him the right to defend himself in a meeting; third, it did not allow the Claimant to be accompanied in the meeting; and last, it did not allow the Claimant a right of appeal.

8. There was a Bundle of Documents. Page references in these reasons refer to pages in that Bundle. I heard evidence from the Claimant. I also read the witness statement of the Claimant's witness, Daniel Turner. Mr Turner did not give evidence and the parties agreed that I should attach appropriate weight to his statement. For the Respondent, I heard evidence from Christopher Woodward. Both parties made submissions.

The Facts

9. The Claimant commenced employment with the Respondent on 24 September 2018. He was dismissed on 22 July 2019.

10. The Claimant signed a contract of employment with the Respondent on 13 October 2018 This contract of employment provided, by Clause 16.1 (p61) and Table 1 (p54), that the Claimant's notice period after his probationary period was 4 weeks. By clause 16.2 the contract provided that the employer could pay the employee his notice pay rather than requiring him to work his notice period, p61.

11. The contract also provided at Clause 18, p63,

    18.2 "We have a Disciplinary and Performance Improvement Procedure. This is a policy document designed to apply where a disciplinary issue is contemplated. The procedure includes: (a) the disciplinary rules applicable to you; and (b) an appeal procedure designed to apply where you are dissatisfied with any disciplinary decision relating to you. Any appeal should be submitted to your immediate line manager's manager.

18.3 We may suspend you for however long we consider appropriate to investigate any aspect of your performance or conduct or to follow disciplinary proceedings. We may attach conditions to any such suspension. You must comply with any such conditions and co-operate fully with any investigation. During any period of suspension, you would normally receive the same pay and benefits as if you were at work, although we reserve the right to withdraw and/or defer pay and/or benefits in appropriate circumstances. Before doing so, we would normally follow the procedure set out in the Disciplinary and Performance Improvement Procedure.

18.4. The Grievance and Disciplinary and Performance Improvement Procedures are policy documents only. As policy documents, neither forms part of your terms and conditions of employment and accordingly we may change them from time to time or decide not to follow them. Copies are available from Human Resources or on our intranet/file server."

12. The Claimant agreed that the disciplinary procedure referred to in clause 18 was the disciplinary procedure in the Respondent's handbook.

13. Clause 27.4 of the employment contract provided that "[t]his Agreement contains the whole agreement between you and us in connection with your employment. With effect from the date upon which your employment under this Agreement starts or started, this Agreement replaces all previous terms and conditions (whether in writing or not) connected with your employment by us" [67].

14. Mr Woodward, Head of Customer Connections at the Respondent, told the Tribunal that he had been involved in a number of disciplinary procedures during his employment with the Respondent, including as an investigation manager and a hearing manager. He told the Tribunal that he had been involved in disciplinary hearings for employees who have both more than and less than 2 years' service. He gave evidence that the Respondent does not go through the full disciplinary procedure set out in the Respondent's staff handbook when deciding whether to discipline or dismiss an employee who has been employed for less than two years. He said that he could think of 4 instances of misconduct when an employee had been employed for less than 2 years and the Respondent had not gone through its full disciplinary procedure with the employee.

15. I accepted Mr Woodward's evidence on all of this. He was not challenged on it

16. The Respondent's Employee Handbook states, p75,

"This Handbook contains our current policies and rules and has been designed to help you understand how the Company is organised, what standards and procedures you are expected to follow and what you can expect from us in return. We hope this will help our new employees to feel part of the team more quickly and be a gentle reminder to us all of the right way to work here."

17. The Respondent's Disciplinary Procedure is set out in its handbook, pp116-118. It also does not state that it is contractual. The Procedure says, amongst other things,

"At all stages of the disciplinary procedure you will:

• be given a right of reply to all and any allegations made against you BEFORE any decision or disciplinary action is taken;

• be advised of the nature of any disciplinary action taken against you and the consequences of such action;

• be advised of any improvement in conduct or performance required and over what time frame; and

• Have the opportunity to be accompanied by a work colleague or Trade Union representative to any disciplinary hearing as described above p116.

18. The procedure also says,

"Disciplinary hearings will usually be conducted by your line manager.

….

At the meeting you will be given the opportunity to respond and to put forward any defence or arguments you want. You may ask questions, present evidence and call witnesses." P116.

"You have the right of appeal against any disciplinary decision taken against you." P117.

19. The Claimant was employed as a Stage 2 engineer in the Manchester area. He was provided with induction by the Respondent training including drilling training, p206.

20. On 12 July 2019, the Claimant drilled into a hot water pipe leading to an ingress of water into a residential apartment building. Significant damage, estimated to be in the region of ten thousand pounds (£10,000), resulted.

21. The Claimant was suspended pending an investigation into the incident.

22. He attended an investigatory meeting conducted by Scott Dyer, his line manager, on 15 July 2022, p202. Mr Dyer asked the Claimant why he had drilled through the wall without knowing what was on the other side and why he had not escalated the matter. The Claimant explained how he had carried out the job and that he had not had difficulties previously in acting in the same way, pp202 – 203.

23. Mr Dyer produced an investigation report, p204. It was not given to the Claimant.

24. Following the investigation, the Claimant was invited to, and attended, a meeting on 22 July 2019 with Chris Woodward, Manager, and Roschelle Alexander-Greenaway, a member of the Respondent's Human Resources Team. Mr Woodward told the Claimant that an investigation had been carried out into the incident and that there had been other similar incidents involving the Claimant. Mr Woodward told the Claimant that the Claimant was being dismissed and would be paid one week in lieu of notice, p206 – 208. In the meeting the Claimant objected to the way the dismissal had been conducted – he said that he had been given no notes and did not have a representative present.

25. The Respondent paid the Claimant his one week's notice of £332.67 (net, with the gross amount being £489.23) on 31 July 2019. The Respondent paid the Claimant a further 3 weeks' pay, being £1,084.45 (net, with the gross amount being 1,467.69) on 19 August 2019.

26. The Claimant told the Tribunal that he expected that the Respondent would follow its disciplinary procedure, as set out in its handbook, before dismissing him. He pointed to clause 18.3 of his contract.

27. He told me, and I accepted, that he was not given notice of the allegations against him before his meeting with Mr Woodward. He also told me, and I accepted, that he was not told that his meeting with Mr Dyer was a formal meeting. The Claimant was not given the right to be accompanied at either his meeting with Mr Dyer or Mr Woodward. He was not permitted to appeal. The Claimant told me that he expected, at least, to have been given the opportunity to answer the allegations against him.

28. The Claimant agreed, in evidence, that if he had been given the investigation report and had been allowed to be accompanied at the meeting with Mr Woodward, the meeting would have gone ahead on 22 July 2019, in any event. The Claimant said, however, that, "Correct but it would have been a disciplinary hearing."

Relevant Law

29. In *Boyo v London Borough of Lambeth* [1995] IRLR 50 and *Gunton's* [1980] IRLR 321), it was held that, where contractual disciplinary procedures have not been followed, a successful Claimant is entitled to damages to reflect the additional time it would have taken for the employer to follow the correct procedures. The possible outcome of a contractual procedure is irrelevant (*Focsa Services (UK) Ltd v Birkett* [1996] IRLR 325, EAT).

Discussion and Decision

30. I found that the Claimant's notice period was 4 weeks. That was not in dispute.

31. I considered whether the contract between the Respondent and the Claimant, which the Claimant signed on 13 October 2022 represented the reality of the employment relationship between the parties and that it was the true agreement between the them.

32. There was almost no evidence that it did not reflect the parties' intentions and agreement.

33. In particular, regarding the contract's provisions relating to the disciplinary procedure in clause 18, the Claimant only told me that he expected that the Respondent would follow its disciplinary procedure. He did not given any evidence about how the contract was entered into, about the relative bargaining positions of the contracting parties, or how the contract was carried out in other cases (as evidence of contractual intention). He did not give evidence that any other of the contract's provisions was inconsistent with the parties' intentions.

34. On the facts, I accepted the dismissing manager, Mr Woodward's, evidence, that, to his knowledge, on 4 occasions the Respondent had not followed its full disciplinary procedures in relation to employees who had less than 2 years service. The Respondent therefore treated the Claimant consistently with its practice in relation employees with under 2 years service.

35. I concluded that the contract signed by the Claimant on 13 October 2022 represented the complete and true agreement between the Claimant and Respondent.

36. That being so, clause 18.4 was entirely clear that the Respondent's disciplinary procedure was not part of the Claimant's terms and conditions of employment and that the Respondent was entitled not to follow it. Nothing in the handbook contradicted this contractual position.

37. I did not consider that clause 18.3 was inconsistent with 18.4. I noted that cl 18.3 provided "we would normally follow the procedure set out in the Disciplinary and Performance Improvement Procedure" before implementing a particular measure in relation to suspension. Clause 18.3 therefore also indicated that the disciplinary procedure would not necessarily be followed in all cases and was therefore not contractual.

38. The Respondent did not breach the Claimant's contract when it failed to follow the disciplinary procedure set out in its handbook.

39. Even if the disciplinary procedures had been found to be contractual, and that Claimant was entitled to be given notice of allegations against him, to be accompanied and to answer the allegations in a disciplinary meeting, the Claimant agreed that the disciplinary meeting would have gone ahead on the same day, on 22 July 2019. An appeal, after dismissal, would not add time to the procedure before dismissal. No additional time would have been added to the disciplinary procedure and the Claimant did not suffer any loss of pay.

40. The Claimant clearly feels that he was unfairly dismissed by the Respondent, in that he was not given any fair hearing before his dismissal. However his claim for unfair dismissal was struck out by the Tribunal because he did not have 2 years' service.

41. His only remaining claim was one for breach of contract. That claim for breach of contract, for the reasons I have given, fails.

_____12 July 2022_____

Employment Judge Brown

SENT TO THE PARTIES ON

14/07/2022.

FOR THE TRIBUNAL OFFICE