



EMPLOYMENT TRIBUNALS

Claimant: Ms Wen Ju Sun

Respondent: Ark Schools

Heard at: London South ET (via CVP) On: 19 July 2022

Before: Employment Judge Curtis

Representation

Claimant: In person, with a Mandarin interpreter

Respondent: Miss Step-Marsden (Counsel)

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The Claimant's claim that the Respondent breached her contract by failing to pay her an additional 11 weeks of notice pay is not well founded. This means that the Respondent paid notice pay for the correct period.
2. The Claimant's claim that the Respondent breached her contract by failing to pay employer pension contributions on her notice pay is well-founded. This means that the Respondent ought to have paid the sum of £5,510.45 in addition to the pay in lieu of notice. The Respondent is ordered to pay the sum of £5,510.45 to the Claimant.

REASONS

Claims and issues

1. The Claimant brought claims of breach of contract, in particular:
 - 1.1. failure to pay the full amount of notice pay to which she was entitled; and
 - 1.2. failure to pay employer pension contributions on her notice pay
2. The ET1 also referred to National Insurance not being paid on notice pay; the Claimant made clear in her statement and orally at the start of the hearing that this was no longer being claimed.
3. In the ET1 the Claimant also referred to a third complaint: that some staff had been offered early retirement as an alternative to being made redundant, and

this had not been offered to the Claimant. At the outset of the hearing I explained that this factual complaint needed to come within one of the types of legal claim the tribunal had the power to decide, the most obvious would be a complaint of unfair dismissal. The Claimant was clear that she did not want to bring a claim of unfair dismissal and that there was no other legal claim being made in respect of the alleged differential treatment. I made sure that the Claimant understood that the effect of this was that her third complaint would not be determined by this tribunal.

4. The issues which fell to be determined are as follows:

Wrongful dismissal/Notice pay

- 4.1. What was the Claimant's notice period?
4.2. Was the Claimant paid for that notice period?

Breach of contract – Pension contributions on notice pay

- 4.3. Did this claim arise or was it outstanding when the claimant's employment ended?
4.4. Did the Respondent do the following:
4.4.1. Fail to pay the employer's pension contributions on the Claimant's pay in lieu of notice?
4.5. Was that a breach of contract?
4.6. If so, how much should the Claimant be awarded as damages?

Documents and evidence heard

5. I was provided with a bundle from the Respondent running to 100 pages, together with a skeleton argument. The Claimant provided her own unpaginated bundle of 57 pages. I had a witness statement and heard oral evidence from the Claimant; her evidence was delivered mainly via a Mandarin interpreter, although at times the Claimant preferred to speak in English. On behalf of the Respondent I had witness statements and heard oral evidence from Miss Sarah Howard-Cofield (People Business Partner) and Tim Dainty (Principal at Ark Evelyn Grace Academy).

Findings of fact

6. The Respondent is a multi-academy trust with 39 schools. Mr Dainty is the Principal of Ark Evelyn Grace ("the School"), one of the schools in the Trust.
7. The Claimant was employed by the Respondent at the School as a Mandarin Teacher from 1 September 2010 until she was dismissed on 31 July 2021. The terms of her employment are contained in a written statement of employment particulars which was signed by the Claimant on 28 February 2011.
8. The material terms relating to termination of employment are at 4.8 of the written statement of employment particulars. This provides:

"4.8 Notice of Termination

ARK's school year consists of 3 terms. You will be required to give two months' notice for the Autumn and Spring Terms and for the Summer term three months, terminating at the end of a school term. For the purposes of these arrangements the notice period will be as follows:

	<i>Last day for resignation</i>	<i>Last day of service</i>
<i>Autumn term</i>	<i>31 October</i>	<i>31 December</i>
<i>Spring term</i>	<i>28 February</i>	<i>30 April</i>
<i>Summer term</i>	<i>31 May</i>	<i>31 August</i>

The end of term dates and the periods of notice of dismissal that the employer must give when terminating the contract by dismissal under the terms of the contract are the same as those dates and periods of notice with which you must comply when terminating the contract by resignation. Where a teacher has been continuously employed for more than eight years, they shall be entitled to receive additional notice as specified in Employment Protection Legislation entitling him/her to one weeks notice for each year of employment up to a maximum of twelve.”

9. The employment contract contained no clause entitling the Respondent to pay the Claimant in lieu of notice.
10. The Claimant was entitled to join the Teachers’ Pension Scheme. She was a member of that scheme and the Respondent made contributions to that scheme on a monthly basis, as reflected in the Claimant’s payslips. The employer’s contributions were £1,102.09 per calendar month.
11. In late April 2021 staff at the School were told that there was to be a reorganisation. The Claimant was sent a letter dated 5 May 2021 informing her of the proposed reorganisation and that the School was inviting volunteers for redundancy.
12. On 6 May 2021 the Claimant and her Trade Union representative had a meeting with Miss Howard-Cofield and Mr Dainty. The Trade Union representative queried whether it would be possible for the Claimant to take early retirement as an alternative to redundancy.
13. A further meeting took place on 11 June 2021. At this meeting Miss Howard-Cofield told the Claimant that early retirement was not possible.
14. A week later the Claimant emailed Miss Howard-Cofield to say that she didn’t want to have any further meetings as she was too upset to discuss things further. The Claimant’s trade union representative spoke with Miss Howard-Cofield about the possibility of voluntary redundancy.
15. On 18 June 2021 the Claimant was sent a letter offering her voluntary redundancy. The letter set out the terms on which it was offered. The following terms are relevant to the Claimant’s claims:
 - 15.1. The Claimant’s employment would end on 31 July 2021
 - 15.2. The Claimant would receive pay in lieu of notice for:
 - 15.2.1. 5 weeks from 31 July 2021, being £5,355.70 less tax and NI
 - 15.2.2. The period of September to December 2021, being £18,618.36 less tax and NI
16. On the same day, Miss Howard-Cofield sent the Claimant an email answering some queries the Claimant raised about the payments. Of relevance to the Claimant’s claims:

- 16.1. In response to the question “Will my NI and pension be paid until 31st December 2021”, Miss Howard-Cofield replied “Yes it would all be covered with your notice pay”
- 16.2. In response to the Claimant’s query about the 11 week part of her notice pay, Miss Howard-Cofield said that the Claimant would work 6 weeks of it, be paid in lieu for 5 weeks (during the summer holidays) and would then be paid in lieu for the period September-December 2021 due to the resignation deadlines in the contract.
17. The Claimant returned a signed copy of the redundancy offer letter confirming her acceptance on 21 June 2021.
18. The Claimant worked until 31 July 2021 when her employment terminated. She was paid her last pay on 26 July 2021. This included all of the sums the Respondent deemed payable, save that an additional amount was paid for the redundancy payment following discussions and agreement between the Claimant and the Respondent post-termination, due to further information about the Claimant’s length of service.

The Law

19. The contractual jurisdiction of employment tribunals is governed by s.3 of the Employment Tribunals Act 1996, together with the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.
20. A contractual claim can only be heard by the Tribunal if it arises or is outstanding on the termination of the employee’s employment and relates to the matters contained in Article 3 of the Order and s.3(2) ETA 1996.
21. Article 3 of the Order provides:
“Extension of jurisdiction
3. Proceedings may be brought before an [employment tribunal] in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—
(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;
(b) the claim is not one to which article 5 applies; and
(c) the claim arises or is outstanding on the termination of the employee’s employment.
22. When determining the meaning and legal effect of the terms of a contract, the task of the tribunal is to ascertain what a reasonable person would have understood the parties to have meant. That hypothetical ‘reasonable person’ would have all of the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
23. The tribunal must consider the contract as a whole when ascertaining the meaning of a particular term or clause. If there are two possible constructions of a contractual term, then the tribunal is entitled to prefer the construction which is consistent with business common sense.

Analysis and Conclusions

Wrongful dismissal/Notice pay – whether the Claimant is entitled to an additional 11 weeks of notice pay

24. The Claimant's case is that she is entitled to an additional 11 weeks' notice pay, pursuant to clause 4.8 of her contract. The Claimant asserts that this additional 11 weeks cannot commence until after the end of the notice period which is otherwise required by the table at clause 4.8, i.e: it cannot commence until after 31 December 2021.
25. In my judgement the Claimant is wrong, for the following reasons.
26. The contract relevant contractual term is quoted in the findings of fact above. This provides for two different periods of notice: the notice as set out in the table (which varies between 2 to 3 months), and the notice as specified in the "Employment Protection Legislation", which can only be a reference to s.86 of the Employment Rights Act 1996.
27. The notice periods set out in the table could result in someone with long service (in excess of 8 years) receiving less notice of termination than the minimum specified in the 1996 Act. It therefore makes sense that the clause goes on to describe what happens to those employees. The clause states that they are entitled to additional notice as specified in the 1996 Act. The clause states that this would entitle an employee to *"one weeks' notice for each year of employment up to a maximum of twelve"*.
28. In my judgment, a reasonable person would have understood the parties to have meant that an employee was entitled to the greater of the two alternative periods of notice. This is a construction which accords with common sense. It is a construction which accords with the final part of the clause ("up to a maximum of twelve"). The alternative construction put forward by the Claimant would result in employees with 8 years or more service receiving double, or in some circumstances more than double, the notice period. That simply does not make sense on an ordinary reading of the relevant term.
29. Even if I were wrong on the meaning of the contractual term, the Claimant freely agreed to the period of notice specified in the voluntary redundancy agreement. There is no cogent argument put forward by the Claimant as to why she should not be bound by that agreement.
30. In her evidence the Claimant stated that she had had difficulty contacting the Respondent's HR team and/or her Trade Union representative to get answers to her queries prior to signing the agreement. Even if there had been some difficulty in getting timely responses, the Respondent's position as to notice pay was made clear in the email from Miss Howard-Cofield on 18 July 2021. The Claimant had that information before she signed the voluntary redundancy agreement.
31. By signing the voluntary redundancy agreement, the Claimant was agreeing to its terms. She cannot now complain that the term as to notice pay ought to be different: it was made clear to her at the time, and she accepted it. She is bound by the agreement she made.
32. The claim in respect of notice pay must therefore fail.

Pension contributions

33. The voluntary redundancy agreement is a contractual agreement between the parties relating to the termination of the Claimant's employment. Alleged breaches of that agreement therefore come within the scope of the Tribunal's jurisdiction.
34. The Claimant's claim is a simple one: she was promised that her employer would make pension contributions on the pay in lieu of notice (per the email from Miss Howard-Cofield on 18 June 2021), that promise was broken.
35. The issue boils down to whether the email on 18 June 2021 amounted to a contractual term that employer pension contributions would be paid on the pay in lieu of notice.
36. The written document which was signed by the Claimant on 21 June 2021 is silent as to whether the employer would make pension contributions on the pay in lieu of notice. I note that that document does not purport on its face to contain the entire agreement between the parties.
37. I note that the email from Miss Howard-Cofield was sent after the Claimant first received the written offer, and prior to the Claimant signing the offer. Whether the query from the Claimant is considered to be a counter-offer or a request for clarification of the terms of the offer, the response from Miss Howard-Cofield was clear. It amounted to a promise that employer pension contributions would be made. There is no suggestion that Miss Howard-Cofield did not have authority to bind the Respondent in these communications. It formed part of the agreement between the parties.
38. Miss Step-Marsden seeks to argue that what Miss Howard-Cofield meant was that the sum being paid in lieu of notice was inclusive of employer pension contributions. In other words: the £18,618.36 for September 2021 to December 2021 was a sum which included the employer pension contribution, and so was actually £4,408 of employer pension contributions and £14,210.36 of gross pay.
39. This is not supported by the evidence. At no point in her evidence did Miss Howard-Cofield suggest that this is what she meant. There is nothing to suggest that this is what was communicated at the time. The more natural reading of the email from Miss Howard-Cofield is that NI would be deducted from the notice pay, and that employer pension contributions would be made as normal.
40. That leads me to conclude that:
 - 40.1. Part of the agreement for voluntary redundancy was a promise by the Respondent to pay pension contributions on the pay in lieu of notice, up to the end of December 2021.
 - 40.2. The Respondent did not pay pension contributions on any of the pay in lieu of notice (being from 1 August to 31 December 2021 inclusive).
 - 40.3. The pension contributions made by the Respondent were £1,102.09 per calendar month
 - 40.4. The appropriate award of damages is £1,102.09 x 5 months, which amounts to £5,510.45

41. The breach arose or was outstanding on termination of employment: the last payment was made on 26 July 2021 and the employment terminated on 31 July 2021.

Employment Judge **Curtis**

Date: 30th August 2022